DOCUMENT RESUME

ED 103 891 CS 201 951

AUTHOR Pickerell, Albert G.; Lipman, Michel
TITLE The Courts and the News Media.
INSTITUTION Project Benchmark, Berkeley, Calif.
PUB DATE 74
NOTE 128p.

EDRS PRICE MF-$0.76 HC-$6.97 PLUS POSTAGE
DESCRIPTORS *Court Doctrine; Court Litigation; *Court Reporters; Courts; *Freedom of Speech; Higher Education; Journalism; News Media; *News Reporting; State Legislation
IDENTIFIERS *California

ABSTRACT

This book is intended to provide reporters who cover court proceedings with a basic knowledge of the organization of California's courts and of the procedures they follow. It contains: material about court organization and jurisdiction, pretrial civil procedure, pretrial criminal procedure, and civil and criminal trial procedure; a legal bibliography; a history of the free press-fair trial movement in the United States; and an article on the current newsmen's shield law controversy. The document concludes with a joint declaration regarding news coverage of criminal proceedings in California, the Code of Ethics of the Society of Professional Journalists, the Code of Judicial Ethics of the Conference of California Judges, and the Code of Judicial Conduct of the American Bar Association. (RB)

The Courts and the News Media

By

Albert G. Pickerell, Ph.D.

and

Michel Lipman, J.D.

Preface

Probably no two American institutions are more interdependent than are the courts and news media. The judiciary, lacking the enforcement machinery of the executive department or the power of the purse strings possessed by the legislative branch of government, is dependent primarily upon public opinion to support the force of its contribution to the governmental process. That public opinion is molded by the news media. The news media, in turn, have historically looked to the judiciary for protection against unconstitutional executive and legislative restraint upon its vital function. Like any other close situation of interdependence, the relationship at times becomes a love-hate one. Frictions develop which, if unalleviated, threaten the mutual interest.

One source of friction between the courts and the news media involves the reporter who covers court proceedings. Once the reporter learns about a possible story, he or she often finds it difficult to verify the story and place it in the proper context. This is especially true when the reporter faces a deadline.

Reporters indicate that this difficulty is caused by a number of factors, including: 1) the lack of a single person to contact for information and clarification of complex court actions; 2) instructions to court personnel from higher-ups not to give information to the news media without prior approval; and 3) the reluctance of many judges to discuss court business with reporters.

On the other hand, while judges recognize the reporter's legitimate interest in the courts, their primary duty is to assure the defendant a fair trial by an impartial jury. Excessive or improper pretrial publicity sometimes makes a fair trial nearly impossible to obtain; therefore many judges prefer little contact with reporters and a minimum amount of publicity concerning court actions. Ethical prohibitions against self-aggrandizement also inhibit judges in their contacts with the press. In addition, some judges point to inaccurate, out-of-focus news accounts and refuse to talk to reporters because they fear being misquoted or having their statements reported out of context.

The most effective way to alleviate this situation--based on misinformation and mistrust--would seem to be a cross-pollination of facts, ideas and attitudes. The one-hundred plus judges, lawyers and newsmen who attended the conference on "The Law, the Courts and the News Media," held in Berkeley in May, 1973, concluded that continuing mutual education is essential if there is to be a satisfactory working relationship among the bench, the bar and the media.

Those who attended the conference--co-sponsored by the California Newspaper Publishers Association, the California Freedom of Information Committee, the

Conference of California Judges, and the UC-Berkeley School of Journalism--emphasized that judges must learn more about what goes on in the newsroom while reporters learn more about what goes on in the courtroom. It is in recognition of this need for continuing mutual education that the Conference of California Judges, through the efforts of its education program Project Benchmark, is publishing *The Courts and the News Media.*

This book is intended to give reporters who cover court proceedings a basic knowledge of the organization of California's courts and of the procedures they follow. In its present form the book should be considered a working draft; it is anticipated that a revised and expanded edition will be published in the future.

Specifically, *The Courts and the News Media* contains material about court organization and jurisdiction, pretrial civil procedure, pretrial criminal procedure, civil and criminal trial procedure, legal bibliography, the history of the free press-fair trial movement in the United States, and an article on the current newsmen's shield law controversy. Obviously, not all topics could be covered in great depth. The reporter's unanswered questions should be directed to his local judges, lawyers, or the staff of the local bar association.

Dr. Albert G. Pickerell is a professor of journalism at the University of California at Berkeley. Michel Lipman is an attorney and Acting Director of Public Affairs for the State Bar of California.

Paulette S. Eaneman, director of Project Benchmark, edited the material with the assistance of a number of individuals whose contributions to this project are hereby gratefully acknowledged: Hon. Arthur L. Alarcon, Judge of the Superior Court, Los Angeles; Hon. Donald R. Fretz, Judge of the Superior Court, Merced County; Hon. Leland J. Lazarus, Judge of the Superior Court, San Francisco; Hon. Harry W. Low, Judge of the Municipal Court, San Francisco; Hon. Ellis R. Randall, Judge of the Superior Court, Solano County; J. Hart Clinton, attorney and publisher of the *San Mateo Times*; Raymond L. Spangler, retired publisher of the *Redwood City Tribune*; Winifred L. Hepperle, Public Information Attorney, Judicial Council of California; Jack E. Frankel, Executive Secretary, Commission on Judicial Qualifications; Harold E. Rowe, Librarian, San Francisco Law Library; Bernard M. Bour, former Director of Public Affairs, State Bar of California; Richard Fogel, Assistant Managing Editor, *Oakland Tribune*; Michael Otten, legal reporter, *Sacramento Union*; M. Russ Jourdane, Editor, *Los Angeles Daily Journal*; Robert E. Work, Co-Publisher, *Los Angeles Daily Journal*; and Nancy Zupanec, Assistant Director of Project Benchmark.

The publication of *The Courts and the News Media* was substantially assisted by the *Los Angeles Daily Journal*, which provided free press time to print this book. Special thanks is therefore extended to Co-Publisher Robert E. Work for his generosity and for his recognition of the importance of positive bench/bar/media relations in California.

The cover illustration was drawn by San Francisco attorney John Lea McDaniels. The drawing depicts the entrance to the Law Library in San Francisco's City Hall.

While the drawing isn't directed to any particular theme, the artist hopes it will suggest to the reader the gravity and importance of the legal process in our lives.

Copies of *The Courts and the News Media* are being distributed to the 850 judges who belong to the Conference of California Judges and to every daily and weekly newspaper and every radio and television in the state. Class sets will also be made available to California's schools and departments of journalism to be used to train future legal reporters. Single additional copies are available at no charge from Project Benchmark, 2150 Shattuck Avenue, Room 817, Berkeley, California 94704.

Finally, for his thirty years of initiative and dedication in the field of bench/bar/media relations, we dedicate this book to the memory of the late Berton J. Ballard, former director of Public Relations for the State Bar of California and the first director of Project Benchmark. His awareness of the need for continuing dialog and accommodation among judges, lawyers and newsmen is a valuable legacy to us all.

Robert S. Thompson
President,
Conference of California Judges

Table of Contents

I COURTS OF CALIFORNIA----------1

Basis of Authority (1)
Kinds of Courts (1)
Jurisdiction (1)
Venue (2)

MUNICIPAL AND JUSTICE COURTS----------2
Districts (2)
Judges (2)
Jurisdiction (3)
Small Claims (3)

SUPERIOR COURT----------4
Districts (4)
Judges (5)
Jurisdiction (5)
Juvenile Court (6)
Probate Court (7)
Domestic Relations (7)

COURTS OF APPEAL----------8
Appellate Districts (8)
Justices (8)
Jurisdiction (8)
Decisions (9)

SUPREME COURT----------10
Justices (10)
Jurisdiction (10)

ANCILLARY ORGANIZATIONS----------11
Judicial Council of California (11)
Administrative Office of the Courts (12)
Commission on Judicial Appointments (13)
Commission on Judicial Qualifications (13)
Conference of California Judges (14)
Center for Judicial Education and Research (15)
The State Bar of California (16)

II PRETRIAL CIVIL PROCEDURE----------17

Kinds of Cases (17)
Public Record (17)
Course of Action (18)
Case in Point (19)
Demurrer (20)

Answer (20)
Discovery (21)
Pretrial Conference (21)
Pretrial Motions (22)
To Trial (23)

III PRETRIAL CRIMINAL PROCEDURE----------24

Rights of the Accused (24)
Sample Case (25)
Arrest (25)
Bail and Appearance (26)
Arraignment (26)
Preliminary Hearing (27)
Rearraignment (28)
Motions (29)
Information (30)
Indictment (31)

IV TRIAL PROCEDURE----------32

Officers of the Court (32)
Trial Briefs (33)
Judge or Jury? (33)
Jury Trial (33)
Trial Starts (35)
Call the First Witness (35)
Objections (36)
Kinds of Evidence (36)
Direct and Circumstantial Evidence (37)
Hearsay Evidence (37)
Expert Witness (38)
Burden of Proof (38)
Reasonable Doubt (39)
Defense (39)
Jury Instructions (40)
Verdict (40)
Motions After Verdict (41)
Judgment and Sentencing (41)
Appeal (41)

V LEGAL BIBLIOGRAPHY----------43

CALIFORNIA CASES----------44
Supreme Court Decisions (44)
Courts of Appeal Decisions (44)
Advance Sheets (45)
Parallel Reporters (45)
Reading the Opinion (45)

Sample Opinion (47)
Finding a Case (51)
The Digests (51)
CALIFORNIA LAWS----------52
The Codes (52)
Using the Codes (52)
Sample Statute (53)
Reading the Code Section (54)
FEDERAL CASES----------54
U.S. Supreme Court Decisions (54)
U.S. Courts of Appeals Decisions (55)
U.S. District Courts Decisions (55)
CHECKING THE LAW----------56
SECONDARY SOURCES----------57
Legal Encyclopedias (57)
California Jurisprudence (57)
Corpus Juris Secundum (58)
Witkin's Legal Summary (58)
Additional Sources (58)

VI FREE PRESS-FAIR TRIAL CONFLICT----------60

Conflict in Focus (61)
THE REARDON REPORT----------62
The Sheppard Mandate (62)
Reardon Recommendations (63)
Remedies Available (64)
OTHER STUDIES----------65
MEDIA REACTION----------66
Lack of Flexibility (67)
VOLUNTARY CODES----------68
Mutual Education (68)
Guideline Workability (69)
THE CALIFORNIA RESPONSE----------70
The Joint Declaration (71)
Statewide Committee (72)
Forming Local Committees (72)
PROTECTIVE ORDERS----------73
Courts' Justification (73)
Two Forms: Direct, Indirect (74)
Orders Against Media (75)
Direct Media Restraint Limited (76)
Closed Trials (77)
California Procedure (78)
Rarity of Situation (79)
"Gag" Orders Questioned (79)
SUMMARY----------81
FOOTNOTES----------84
JOINT DECLARATION----------86

VII NEWSMEN'S SHIELD LAWS----------80

An Underlying Tradition (90)
Upsurge of Subpoenas (91)
The Caldwell (Branzburg) Case (92)
Use of Confidential Sources (93)
Attorney General's Guidelines (94)
Privilege "Pros" and "Cons" (95)
Absolute or Qualified Privilege (96)
Who Should Be Protected? (97)
What Should Be Protected? (98)
Two-Level Approach (98)
State Standards (99)
The Federal Scene (100)
California's Shield Law (101)
The Farr Case (102)
Conclusions (104)

FOOTNOTES----------107

The preparation of these materials was financially aided through a Federal Grant from the Office of Criminal Justice Planning under the Omnibus Crime Control and Safe Streets Acts of 1968. The OCJP disclaims responsibility for any opinion or conclusions contained herein.

Paulette S. Eaneman - Project Editor
Nancy Zupanec - Assistant Editor

Courts of California

BASIS OF AUTHORITY

THE PRESENT SOURCE OF OUR COURTS' AUTHORITY is the California Constitution, first adopted in 1849, revised and readopted in 1879, and amended hundreds of times since then. The original Constitution was modeled after those of several other states, including Iowa, New York, Louisiana, Wisconsin, Michigan, Texas and Mississippi. It was also influenced by the United States Constitution and the common law of Mexico, which was in effect in California until 1848.

KINDS OF COURTS

THE CONSTITUTION PROVIDES for two kinds of courts: (1) *trial courts* to hear evidence for the purpose of determining the facts of a case, and to decide the case on its merits according to the trial judge's understanding of the applicable law; and (2) *appellate courts* to determine whether the trial court committed errors of law, i.e., applied the wrong law or made erroneous rulings on the law, and if so whether the errors were prejudicial to the original decision.

California's trial courts include the superior, municipal and justice courts. Some of these trial courts may operate under different names when they perform special duties. For example, when the superior court handles juvenile matters it sits as the Juvenile Court, and when the municipal court hears small claims cases it is referred to as the Small Claims Court. But when a judge presides over such special proceedings, usually sitting in the same courtroom in which he hears other matters, he is still a judge of either the superior or municipal court.

JURISDICTION

JURISDICTION IS A TERM with several meanings. It may refer to the geographical area in which a case can be commenced. For example, if you're suing about title to a piece of land in Yolo County, you must bring your suit in that county; you can't file the suit in Butte County.

The term jurisdiction also refers to the power of a particular court to handle certain kinds of cases. In the land title example, you must not only file

your suit in Yolo County, you must also file it in the proper court in that county. That would be the superior court, which has the power to hear civil actions affecting title to real property, rather than the municipal or justice court.

A court must also have jurisdiction over the parties involved in the case. There may be several different defendants in a lawsuit. A court only has power over those defendants who have been properly served with a summons and complaint. The court lacks jurisdiction over those who have not been properly served, unless the defendant voluntarily submits himself to the court's jurisdiction.

VENUE

VENUE REFERS TO THE PLACE where a trial is held, and it involves the ability of the court to hear a case fairly. A sensational case may generate a lot of pretrial publicity in a particular community. In such a case the judge, after hearing from the attorneys, may feel this publicity will hamper selection of an unbiased jury. So the judge will order a change of venue; that is, he will have the case transferred to another part of the state where there is a better chance of drawing a jury not already familiar with the case.

MUNICIPAL AND JUSTICE COURTS

DISTRICTS

EACH COUNTY OF THE STATE IS DIVIDED into judicial districts from which judges are elected to municipal and justice courts. Municipal courts exist in districts where the population is over 40,000; if the district is smaller it may have one or more justice courts. The various counties pay the salaries of the judges and the justices of the peace, supply their courtrooms, and provide their staffs and supplies. These expenses are paid in part by the filing fees charged to start civil litigation, i.e., a dissolution of marriage or adoption proceeding.

JUDGES

MUNICIPAL AND JUSTICE COURT JUDGES ARE ELECTED by the voters of their respective judicial districts for six-year terms. Vacancies in municipal courts are filled by appointment of the Governor, and vacancies in justice courts are filled by appointment of the county board of supervisors or by a special election called by the board.

Municipal court judges must either have been practicing attorneys or a judge of a court of record for five years immediately before their election or appointment to the bench. Justices of the peace must either have been practicing attorneys at the time of their election or appointment, or within four years before election or appointment have passed a qualifying examination given according to Judicial Council regulations.

JURISDICTION

MUNICIPAL AND JUSTICE COURTS have both civil and criminal jurisdiction in certain instances. Justice courts may hear civil claims of up to $1,000, while municipal courts have jurisdiction up to $5,000 in civil matters. Both courts may hear small claims matters of $500 or less.

Municipal and justice courts have criminal jurisdiction over misdemeanors--offenses not punishable by imprisonment in the state prison--and over infractions, such as traffic tickets.

Both courts may conduct preliminary arraignments, proceedings in which individuals arrested on felony charges are informed of the specific charges against them and are told of their right to counsel. If the accused cannot afford a private attorney, the judge must appoint counsel to represent him. He will probably appoint a public defender if the county has one; if not, he will appoint a private attorney who has previously agreed to represent indigent clients.

After the defendant has been arraigned, the municipal or justice court judge must conduct a preliminary hearing to determine if a crime was committed and if there are reasonable grounds to believe that the accused committed the crime. If so, then the judge must bind the defendant over to the proper court for trial. Suppose the accused was arrested for stealing a diamond ring worth $5,000--a felony in California, triable in the superior court. If the ring turns out to be an imitation worth only $50, the crime is only petty theft, a misdemeanor triable in the municipal or justice court where the preliminary hearing is held.

Decisions made by municipal and justice court judges may be appealed to the appellate department of the superior court in the county where the original trial was held. In some instances there may be a further appeal to the state courts of appeal, or if the case involves a national constitutional issue, to the United States Supreme Court.

SMALL CLAIMS

MUNICIPAL AND JUSTICE COURTS CAN BOTH SIT as small claims courts, following special rules and procedures. The small claims court was created to provide a forum for the disposition of suits involving small sums of money, its jurisdiction being limited to actions for money involving less than $500. For instance,

you may sue to get money from someone who owes you for personal injury, property damage, labor, goods sold, money lent, a bad check, or a dented fender.

The advantage of the small claims court is its informal procedure which minimizes the considerable expense and delay of a normal trial. In small claims court, neither side can bring an attorney. Only those parties who are personally involved are allowed to participate. A merchant with a claim, for example, can't assign it to a collection agency or some other person to sue for him. He must do it himself, coming into court alone to explain his case to the judge. Corporations, which are persons in the eyes of the law, may appear by sending one of their officers.

The judge listens to the arguments, and he may hear witnesses and examine the books and papers the parties have brought with them. The procedure is not bound by formal rules of evidence. There is no jury. The plaintiff, by choosing to take his case to small claims court, gives up any right to appeal the decision. The defendant, however, may appeal the decision to the superior court within twenty days of judgment. The small claims court is not a court of record, where transcripts and detailed, formal records of the proceedings are kept. If the defendant appeals, there is a new trial--or *trial de novo*--before a judge of the superior court, who hears the case as though it had not been tried before.

SUPERIOR COURT

MOST OF THE NEWS REPORTER'S day-to-day work takes place in superior court. This is where the major criminal trials and civil suits are tried. Here, too, you'll see the whole gamut of the state's legal problems--cases of embezzlement, robbery, condemnation, contracts, etc.

DISTRICTS

CALIFORNIA HAS FIFTY-EIGHT SUPERIOR COURTS, one for each county or city and county. And each court has at least one judge. Superior courts vary in size from 23 one-judge courts to the 161 judges of the superior court of Los Angeles County.

Where there are more than two judges in a superior court, the California Constitution requires them to choose a presiding judge from among themselves. The presiding judge assigns trials and determines the court's calendar or order of business.

In counties with more than one judge, the superior courts are also organized into departments of one judge each. The presiding judge designates the kind of cases--i.e., civil, criminal, juvenile--to be heard by the judge who sits in each department of his court. However the superior court is a single entity, regardless of the number of departments.

The cost of operating California's superior courts is presently shared by the state and the various counties.

JUDGES

SUPERIOR COURT JUDGES, according to the California Constitution, must be attorneys admitted to the practice of law in California for at least ten years immediately preceding their election or appointment, or they must have been a judge of a court of record during part or all of this time.

Superior court judges are elected in general state elections for six-year terms by the voters of their county. Judges may also be appointed by the Governor upon the retirement or death of an incumbent judge, or to fill a position created by the addition of a judgeship. Appointed judges must stand for election when the term of the judge they were appointed to replace expires.

JURISDICTION

SUPERIOR COURTS HAVE JURISDICTION over certain civil and criminal proceedings, as well as a number of specialized matters:

1. *Civil -- Superior courts have jurisdiction in civil matters in which money judgments of over $5,000 are sought. They also have exclusive jurisdiction, regardless of the amount involved, over certain proceedings, such as dissolution of marriage, probate matters, and actions affecting the title to real property.*

2. *Criminal -- Superior courts have jurisdiction over all crimes designated as felonies, or criminal offenses punishable by death or by imprisonment in a state prison.*

3. *Appeals -- Superior courts may hear appeals from municipal and justice courts.*

4. *Equity -- Superior courts hear special matters, such as injunction proceedings, administration of trusts, and foreclosure of mortgages.*

5. *Writs -- Superior courts may grant prerogative writs--for example, habeas corpus, to determine if a person is being legally held prisoner--as well as writs of mandamus, certiorari and prohibition, ordering a party to do or not to do something.*

6. *Special -- Superior courts have special jurisdiction in probate matters or the administration of wills, guardianships, and conservatorships; in domestic relations matters, including dissolution of marriage, legal separation, declarations of nullity of marriage, reciprocal enforcement of support, and paternity actions; in juvenile matters*

involving the correction and protection of minors and delinquent children; in the adoption of minors; and in psychiatric actions for the protection and custody of the mentally ill.

JUVENILE COURT

THE SUPERIOR COURT HAS SPECIAL JURISDICTION in cases in which juveniles are involved, and the presiding judge of each superior court designates a judge or judges to sit on the juvenile court. He may also appoint referees to hear juvenile court cases; referees must have had at least five years experience as attorneys in California or experience as probation workers on the supervisory level.

The presiding juvenile court judge appoints at least one probation officer, who is charged with representing the interest of any minor who is the subject of a petition to declare him a ward of the court or a dependent child. When ordered to do so, the probation officer investigates the custody, status and welfare of minors.

The juvenile court has power over individuals under eighteen years of age who fall into one of three categories:

1. *Those who are without a fit guardian or home, or who are physically dangerous to the community because of a mental or physical abnormality;*

2. *Those found to be beyond the control of their parents, guardians, or school authorities, or who are "in danger of leading an idle, dissolute, lewd, or immoral life"; and*

3. *Those who have committed acts which would be crimes if committed by an adult.*

The purpose of juvenile court law is to protect the welfare of minors. Since the proceedings are noncriminal in nature and because of the benevolent rationale of juvenile court law, minors were thought to be unprotected by the constitutional safeguards of due process of law. In recent years, however, many courts--including the United States Supreme Court--have recognized that since juvenile courts hear proceedings which may result in commitment of the juvenile to a state institution, these proceedings must comply with the essentials of due process and fair treatment.

Minors coming under the first classification noted above are called dependent children; they are usually without fit homes and may be placed in foster homes or with responsible social agencies. Other minors are called wards of the court. They may be placed in juvenile halls, ranches or work camps or--if their behavior is a serious problem--committed to the California Youth Authority to be confined in a reform school.

The central aim of the juvenile justice system is rehabilitative and not punitive. Since the law recognizes that juvenile proceedings carry the stigma of criminality, its hearings are confidentaal. Only court workers, the minor, his parents, the involved attorneys, and a few other persons specifically designated by the juvenile court judge may attend juvenile hearings or see juvenile court records. In some instances judges do invite local reporters to sit in on juvenile hearings, but only with the understanding that the names of the juvenile offenders will not be published. Court opinions mention only the first name and last initial of the minor, for example *In re Andrew D.* After five years, if a minor previously before the court has not been convicted of a felony or a serious misdemeanor, his records are sealed and may be destroyed; the law then treats him as never having been before the court at all.

Probate Court

LEGALLY SPEAKING there is no separate probate court in California. However the superior court department which hears probate matters is often called the probate court.

Probate jurisdiction involves the supervision of the administration of estates of persons who died while residents of California, or who left property within the state. In probate terminology an estate is simply the assets and liabilities left by the decedent. Administration refers to the accumulation of the decedent's property, the payment of his debts, and the distribution of his property to his family or other beneficiaries. This is done by an executor named in the will, or when the decedent died without a will or failed to name an executor in his will, by a court-appointed administrator. Both perform the same functions, including payment of the decedent's debts. When this is done, the court directs the distribution of the estate to those claiming it under the will or the laws of intestate succession.

The probate jurisdiction of the superior court also includes guardianship and conservatorship proceedings involving the person and estates of minor children or incompetent individuals.

Domestic Relations

SUPERIOR COURTS ALSO HANDLE domestic relations disputes--such matters as annulment or dissolution of marriage, custody and visitation rights of minor children, division of community property, and child and spousal support. In larger counties these controversies are usually assigned to a special department of the court known as the Domestic Relations Department.

This court may also sit as a conciliation court, whose purpose is to protect the rights of children and to preserve family life by trying to prevent the breakup of the marriage. At hearings in the conciliation court judges handle

controversies between spouses which might, unless reconciliation is achieved, result in disruption of the household and injury to the welfare of a minor child.

Either spouse may call on the conciliation court before filing for separation, annulment or dissolution of marriage. And the superior court may also transfer domestic relations cases to a conciliation court when the judge believes there is a reasonable chance of reconciliation. Petitions may be accepted even when children are not involved if the court finds that reconciliation is possible. When one party files for conciliation, neither spouse may file for dissolution until thirty days after the hearing. Proceedings are confidential and the files of the court are closed to all but the parties involved in order to protect their personal privacy.

COURTS OF APPEAL

APPELLATE DISTRICTS

CALIFORNIA'S INTERMEDIATE APPELLATE COURT, the District Courts of Appeal, was created by a constitutional amendment adopted on November 8, 1904. This addition to the Constitution has been reamended several times, and in November, 1966, the name of the court was officially changed to the Courts of Appeal.

Currently this court is divided into five appellate districts with thirteen divisions and forty-eight justices:

First -- *San Francisco, 4 divisions with 3 justices in each division;*

Second -- *Los Angeles, 5 divisions with 4 justices in each division;*

Third -- *Sacramento, 1 division with 4 justices;*

Fourth -- *San Diego, 2 divisions with 4 justices in San Diego and 5 in San Bernardino; and*

Fifth -- *Fresno, 1 division with 3 justices.*

JUSTICES

COURTS OF APPEAL JUSTICES are appointed by the Governor and must be confirmed by the Commission on Judicial Appointments. This Commission is made up of the Chief Justice of the Supreme Court, the Attorney General, and the presiding justice of the court of appeal of the affected district.

To qualify for appointment as a justice, one must have been a member of the State Bar of California or have served as a judge of a court of record in

California for the ten years immediately preceding appointment. After confirmation the justice serves until the next gubernatorial election when he runs unopposed on a nonpartisan ballot in the district of his appointment. Justices of the courts of appeal are elected for twelve-year terms.

JURISDICTION

THE COURTS OF APPEAL HAVE EITHER original or appellate jurisdiction in these instances:

1. *Original jurisdiction to issue writs of habeas corpus and extraordinary relief in the form of writs of mandamus, certiorari and prohibition.*

2. *Appellate jurisdiction to review decisions of all cases in which the superior court has original jurisdiction, except when the death penalty is involved.*

3. *Appellate jurisdiction over any case pending before the California Supreme Court if the Supreme Court orders the case transferred to a court of appeal for its consideration.*

4. *Appellate jurisdiction over any case on appeal from a municipal or justice court to the appellate department of the superior court, when the superior court asks the court of appeal to take a case or when the court of appeal orders a case transferred to it for hearing. Such transfers are made if they are necessary to secure a uniform decision or to settle important questions of law.*

DECISIONS

NORMALLY THREE JUSTICES HEAR AND DECIDE each appeal. Two justices must be present for the formal conduct of business and two must agree to pronounce a judgment.

When a court of appeal decides a case it may write an opinion giving its reasons. These opinions will be published in the official *California Appellate Reports* if they establish a new rule of law or alter or modify an existing rule, if they involve a legal issue of continuing public interest, or if they criticize an existing law. Only about 20 percent of the courts of appeal decisions are now published in the official reports.

SUPREME COURT

THE SUPREME COURT IS THE COURT OF LAST RESORT in California; its decisions are binding on all other courts within the state.

The Supreme Court is made up of a chief justice and six associate justices. Usually all seven justices hear arguments on every case appealed. If one justice is ill or disqualified, a judge of another court--usually a court of appeal--may be assigned temporarily by the Judicial Council to take his place. Four of the justices present for the argument of a particular case must agree before the decision of a lower court may be either affirmed or reversed.

JUSTICES

JUSTICES OF THE SUPREME COURT must also have been active attorneys or judges of a court of record for the ten-year period immediately preceding their appointment to the bench. They are appointed and elected in essentially the same way as are court of appeal justices, and they serve for the same length of time. However, the third member of the Commission on Judicial Appointments, which confirms Supreme Court appointments, is the presiding justice who has served the longest on any court of appeal. And Supreme Court justices run unopposed on a statewide ballot.

JURISDICTION

THE SUPREME COURT HAS JURISDICTION in these matters:

1. *Original jurisdiction to issue writs of habeas corpus, mandamus, certiorari and prohibition.*

2. *Original jurisdiction to review the recommendations of the Commission on Judicial Qualifications and the State Bar of California concerning the discipline of judges and attorneys. The Court may order the removal of a judge or the suspension or disbarment of an attorney.*

3. *Appellate jurisdiction when judgment of death has been pronounced.*

4. *Appellate jurisdiction to transfer to itself from a court of appeal any pending case before the court of appeal decision becomes final. This power enables the Court to pass on important legal questions and to resolve conflicts in rulings among the various divisions of the courts of appeal. Any party to a case may petition for a hearing before the Supreme Court after a decision by a court of appeal. If the Supreme Court decides to hear the case, the court of appeal's decision is nullified and treated as having no legal effect.*

If the case decided by the Supreme Court is one involving federal law or the rights of a party under the Constitution of the United States, there may be further proceedings in the Federal courts after a final decision by the state Supreme Court.

All decisions of the Supreme Court are published in the official *California Reports*, as well as in competing commercial publications.

ANCILLARY ORGANIZATIONS

JUDICIAL COUNCIL OF CALIFORNIA

4200 STATE BUILDING
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

415-557-3203

The primary administrative agency of the California court system is the Judicial Council. This body was first established by the adoption of the California Constitution on November 2, 1926. Membership on the present Council was established by a 1966 constitutional amendment.

The twenty-one Council members include the Chief Justice of California--acting as chairman--one other Supreme Court justice, three courts of appeal justices, five superior court judges, three municipal court judges, and two justice court judges, each appointed by the chairman for a two-year term. Other members include four members of the State Bar of California, appointed by its governing body for two-year terms, and one member each of the Senate and Assembly, appointed as provided for by the Legislature.

All Council members serve without pay except for reimbursement for travel and lodging expenses incurred in connection with Judicial Council duties. To be valid, an act of the Council must be approved by the majority of its members.

The Council has two principal functions:

1. *To survey the business of the courts and make recommendations for improving the administration of justice; and*

2. *To make rules for court administration, practice, and procedure.*

The Council makes an annual report to the Governor and the Legislature containing recommendations regarding court operations. For example, the Council compiles statistical reports indicating the manpower needs of the courts and recommends the addition of judgeships when a county's caseload warrants it.

The chairman of the Council has responsibility to expedite judicial business

and to equalize the work of the judges. He may assign a judge to another court in another county to assist with its crowded calendar, providing the judge agrees to the assignment. He may also assign a retired judge to any court where he is needed.

The Judicial Council also employs a public information attorney who prepares press releases announcing Supreme Court decisions and Council actions to the news media. This attorney handles requests from reporters throughout the state for information concerning the judicial system and interpretation of Court decisions.

Many Judicial Council recommendations have had a lasting impact on the California court system. For example, at the direction of the Legislature, the Judicial Council in 1941 drafted California's first rules of appellate procedure. These rules, as amended and expanded, are now contained in the California Rules of Court. Council study also led to the enactment of the Administrative Procedure Act in 1945, requiring uniform rules of procedure and practice for the state's administrative agencies. In 1950 the Judicial Council sponsored a constitutional amendment which was adopted by the voters and reorganized the court system below the level of the superior court. This amendment reduced the different kinds of courts then in existence from seven to two--the present municipal and justice courts.

In 1967 the Council recommended enactment of legislation reclassifying minor traffic violations as noncriminal infractions. In 1970 the Council recommended creation of the office of the State Public Defender to represent indigent defendants on appeal. And in 1970 and 1971 the Council conducted two trial court reorganization studies, looking in depth at the management, staffing and financing of California's lower courts and the feasibility of a completely unified trial court system which would consolidate all California trial courts into one superior court that could have jurisdiction over all matters now handled by trial courts. Not all of these recommendations necessarily will be adopted, but the work of the Judicial Council is the starting place for much of the legislation which affects the operation of the California court system.

ADMINISTRATIVE OFFICE OF THE COURTS

4200 STATE BUILDING
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

415-557-3203

The Administrative Office of the Courts was created by a constitutional "delegation of authority" to the Judicial Council in 1960. This delegation of authority provides that the Council may employ an Administrative Officer who, under the supervision of the Council's chairman, will employ, organize and direct a staff which will assist the Council in carrying out its duties.

As staff agency for the Judicial Council, the Administrative Office of the Courts publishes annually a statistical report concerning the state's judicial

business. This report is published as a second part of the Council's annual report to the Governor and the Legislature.

Commission on Judicial Appointments

4200 STATE BUILDING
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

415-557-3203

Judges win their offices in one of two ways: (1) they run for office and are elected; or (2) they are appointed by the Governor to fill an unexpired term of another judge or a newly created judgeship.

When vacancies occur in the courts, the Governor cannot know all the possible appointees personally. So he must rely on the recommendations of his advisors. But it is no easy matter--especially at the appellate court level--to know if a particular judge or attorney has the right temperament, background, experience and qualifications to hold so important an office.

The Commission on Judicial Appointments is the group established by the California Constitution to review the Governor's appointments to the Supreme Court and the Courts of Appeal; the Governor must have its confirmation before his appointee may take office. Members of the three-man Commission are the Chief Justice, the Attorney General, and the senior presiding justice of the court of appeal in the district which has a vacancy--or when there is a vacancy on the Supreme Court, the senior presiding court of appeal justice in the state.

Commission on Judicial Qualifications

3041 STATE BUILDING
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102

415-557-0686

Judge Blank has grown old before his time. His critics say he is senile. They claim he has no idea of what the witnesses are saying or of the legal points being considered in the cases he tries. His rulings are irrational, his decisions incomprehensible. Judge Blank, who served the court creditably for many years, is now unfit to be a judge.

"Retire?" He glares at anyone making this suggestion. "Why should I retire? Years of experience. Long and distinguished career. Never felt better in my life. No sir, I intend to occupy the bench in my court for a long time yet."

Plainly, the esteemed judge won't retire voluntarily. So how do you remove him? Wait for the next election and bellow his incompetency to the voters? Surely a dirty business and probably unsuccessful.

An effective and practical solution was to establish the Commission on Judicial Qualifications through a provision of the 1960 California Constitution. This Commission is made up of two courts of appeal justices, two superior court judges, and one municipal court judge, each appointed by the Supreme Court; two lawyers who have practiced for at least ten years, appointed by the State Bar of California's Board of Governors; and two public members, appointed by the Governor and approved by the Senate. All terms are for four years.

The Commission has power to investigate judges for misconduct, wrongdoing or disability, to hold hearings, and to make removal recommendations to the Supreme Court. The Court may dismiss the charges, or it may censure or remove a judge. In addition, as part of its investigatory function, the Commission often can correct errant behavior by a judge, through its action on detrimental but relatively minor misdeeds.

The Commission acts discreetly, so as not to harm the reputation of judges under investigation or to cause unnecessary pain to their families. The complaints are kept confidential, but cases which go to the Supreme Court are publicized. The Commission's annual report summarizes its work. These reports indicate that the Commission has brought about the retirement or resignation of a number of judges since its creation.

CONFERENCE OF CALIFORNIA JUDGES

ADMINISTRATIVE OFFICE
2150 SHATTUCK AVENUE, #806
BERKELEY, CA 94704
415-843-7118

PROJECT BENCHMARK OFFICE
2150 SHATTUCK AVENUE, #817
BERKELEY, CA 94704
415-845-8718

The Conference of California Judges is a voluntary organization of the judges of the state's courts of record--municipal and superior courts, courts of appeal, and the Supreme Court. The Conference evolved from the Superior Court Judges Association of California, which was formed in 1929 after the state Supreme Court ruled that judges of California's courts could not be members of the State Bar. At present, over 850 judges belong to the Conference.

The affairs of the organization are directed by an Executive Board consisting of twenty-one members, elected by the membership. Membership on the board is required to be representative of the geographic areas of the state.

The purposes of the Conference as stated in its Bylaws include: (1) improvement of the administration of justice; (2) consideration of matters concerning the judiciary directly or indirectly; (3) promulgation of canons of judicial ethics and interpretation of these from time to time; and (4) promotion of the exchange of ideas and encouragement of cooperation among the members of the judiciary.

In order to pursue these goals, the Conference has established approximately twenty-one standing committees which serve an educational purpose for the Conference by studying and making recommendations on such matters as proposed legislation, canons of ethics, and current judicial procedures.

The Conference's emphasis on education has produced particularly important results. The Conference pioneered in organizing both municipal and superior court workshops. It conceived a College for Trial Judges, to provide both new and experienced judges with specific training necessary for the fulfillment of their judicial responsibilities. And it is currently sponsoring Project Benchmark, a public education and information program.

One of Project Benchmark's goals is informing the public of the role the courts play in their lives. Toward this end, the Project has produced a pamphlet on court structure and a guide to court tours, as well as several education units available to teachers preparing lessons on the judicial process.

In addition Project Benchmark seeks to keep Conference members informed of the climate of public opinion through such means as a monthly log of editorial comment. It also advises judges on local public information problems.

Finally, Project Benchmark attempts to bring about fuller communication and cooperation between the courts and the news media.

CENTER FOR JUDICIAL EDUCATION AND RESEARCH

2150 SHATTUCK AVENUE, #808
BERKELEY, CA 94704

415-549-0926

The California Center for Judicial Education and Research develops judicial education programs for California judges, prepares written materials for judges, and conducts research in judicial education. The Center organizes orientation programs for new judges, seminars and workshops for all judges, and prepares judicial manuals and reference works.

Policy for the Center, created in 1973, is provided by an eight-member Governing Committee named by the Chief Justice of the Supreme Court. The Center is currently funded by a grant from the California Council on Criminal Justice, made jointly to the Conference of California Judges and the Judicial Council. The work of the Center is carried out by a director, hired by the Governing Committee, and his staff.

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO, CA 94102

415-922-1440

If an attorney wants to practice law in California, he must be a member in good standing of the State Bar of California. Otherwise, he may not practice without risking a jail sentence. The State Bar is a public corporation, created by act of the Legislature in 1927. It is called an integrated bar, as distinguished from a voluntary bar, to which lawyers may or may not belong without jeopardizing their right to practice.

The State Bar examines candidates for licenses. If a person passes the bar examination and is otherwise qualified, the State Bar will certify him to the California Supreme Court, which then admits him to practice in all state courts.

The Bar keeps careful watch on the conduct of its members. It has an experienced staff which studies complaints against attorneys, and when the study warrants it, the State Bar files formal proceedings against individual attorneys. If an attorney is found guilty of the charges, he may be reproved privately or publicly, and more severe penalties may be imposed if the Bar recommends suspension or disbarment to the Supreme Court. The Court may accept the recommendation, or it may increase or decrease the penalty sought. The State Bar routinely releases to the news media the names and a brief description of the offenses or misconduct committed by those attorneys who are publicly reproved, suspended or disbarred.

The State Bar may, after its own study or the study of local voluntary bars, seek legislation on a variety of topics. These may range from the very technical to matters of broad concern, such as no-fault insurance, reform of the courts, use of certified legal assistants and revision of probate laws.

The Bar has actively encouraged funding for legal assistance to the poor. It has helped organize and fund the California Lawyers Service, a prepaid system by which low and lower middle income families can get legal services when needed, at costs they can afford.

It also supervises "arrangements" for group legal services, which help provide reasonably-priced advice, counsel, and help for members of trade, professional and labor groups.

Another important area of the Bar's work is its working agreement with the University of California for the Continuing Education of the Bar. CEB is the organization that provides workbooks on California law and sets up seminars on a variety of subjects for attorneys throughout the state. CEB also produces cassette tapes, and has recently inaugurated a program of videotape presentations for attorneys in areas where seminars are not feasible.

Pretrial Civil Procedure

CRIMINAL CHARGES ARE BROUGHT AGAINST INDIVIDUALS or companies by the people of the State of California acting through the district attorney. *Civil cases, on the other hand, are brought against individuals or companies by other individuals or companies.*

KINDS OF CASES

WHILE IN A CRIMINAL CASE the district attorney may ask for a prison sentence or a fine or both for the accused, in civil actions the plaintiff usually seeks money damages to be paid by the defendant. Such cases include, for example, the claims of accident victims, disputes over business transactions and questions of property rights.

However civil cases may also involve situations in which money damages are not sought. For example, in a dissolution of marriage suit what the parties are asking for is the severance of their marriage ties. In probate actions, the court administers the disposition of the decedent's estate. Other civil actions which do not involve damages include suits to change a party's legal name, to establish the fact of death, to nullify a marriage, to decide the custody of minor children, and to adjudge the mental competency of an aged or ill person.

Sometimes, too, civil suits are brought to stop someone from doing something. For example, a lumber company is cutting trees on Roger Smith's property without his permission. Smith can sue for an injunction to stop the tree cutting. Probably he will ask the court to grant a preliminary injunction, and his petition usually will be heard within a few days. If it grants the injunction, the court will order the lumber company to stop the tree cutting until a proper trial can be held, at which time the controversy can be more carefully examined.

A civil action can also be brought to compel someone to act. The clerk refuses to issue a building permit, although the applicant has fully complied with all existing requirements. The court, after a hearing, may order the clerk to issue the permit. The court enforces such orders by holding the party in contempt of court if he refuses to comply.

PUBLIC RECORD

THE CIVIL COMPLAINT ALWAYS NAMES THE PLAINTIFFS--those who bring the suit--

and the defendants--those of whom something is being asked.

When petitions are filed for writs such as name changes or fact of death, the action will be titled *In re Charles Jones*. When one party files a suit against another party the action will be titled *Davis v. Hall*, signifying Davis "versus" Hall.

The complaint must set forth facts which, if proved, will entitle the plaintiff to a judgment. It must also contain a *prayer*, the last paragraph, saying what the plaintiff wants: *"Wherefore, plaintiff demands judgment against George Hall in the sum of $8,000 principal, interest, costs of suit, and such other and further relief as the court may adjudge."*

It is important to know that all court records, including complaints and petitions, are--with only rare exceptions--open to the public and available for inspection on request from the county clerk or the clerk of the court.

COURSE OF ACTION

THE COURSE OF THE USUAL CIVIL LAWSUIT, whether it be a personal injury claim, money due for goods or services, a question of liability for faulty products, or breach of a contract, is very briefly:

--Plaintiff files an action with the court.

--Clerk of the court issues a summons.

--Defendant has at least twenty days to file his answer or demurrer with the clerk of the court. If the defendant fails to respond in the time allowed by law, the plaintiff may file for a default judgment.

--Defendant may answer--that is, admit or deny each of the plaintiff's allegations and set forth any reasons why the plaintiff is not entitled to the relief he seeks.

--Defendant may demur or say that even if everything in the complaint is true, it still doesn't prove his liability. So a demurrer is concerned with the question of whether the facts pleaded to constitute a cause of action; a demurrer may also call attention to some particular defect in the complaint.

--Defendant may cross-complain, making claims of his own against the plaintiff. The parties then become known as "plaintiff and cross-defendant" and "defendant and cross-complainant."

--Plaintiff may demur to the cross-complaint.

--Plaintiff or defendant may move for a summary judgment.

--Plaintiff or defendant may take discovery procedures against the other side; usually each will do so. That is, each takes the depositions or sworn testimony of witnesses on the other side, or demands sworn answers to certain written questions or interrogatories. The other side must answer these questions, if they are proper.

--Either side may make additional pretrial motions.

--When the case is "at issue" one side may make a motion to set for trial. But before the actual trial begins, there will usually be a pretrial conference with a judge to see which questions can be disposed of by stipulation or prior agreement and whether there is any chance for an agreement or settlement before trial.

--Most of these motions and pretrial hearings are appealable; one side, for example, may feel that a demurrer was improperly permitted or sustained. So it goes to a higher court, usually a court of appeal, for review. This may set off a new chain of hearings and appeals, and sometimes several years may elapse before a case comes to trial.

--Either side may ordinarily demand and get a jury trial. However, the trial may not be a final determination either.

--The losing side may make a motion for a new trial, which the court may grant. This kind of motion may be part of a negotiating process: Smith gets a judgment against Peterson for $500,000. Peterson then moves for a new trial. If this motion is granted, Smith may spend a lot more time and money in court, and he may get a smaller judgment or he may lose out entirely. So he's very apt to try to work out a settlement for something less than the original $500,000 award made by the jury.

--In addition, or as an alternative, the losing side may appeal the trial court's judgment.

CASE IN POINT

ATTORNEY JAMES GREEN HAS A CLIENT, Miss Maude Crowley, who worked as housekeeper and practical nurse for Horace Snell, an elderly partially paralyzed gentleman. Maude received room and board and some spending money, but no salary. Instead Mr. Snell promised to leave her half his considerable estate. Unfortunately, Mr. Snell did not put his promise into writing. And more unfortunately, he did not write a will at all. In the absence of a will, Mr. Snell's estate would go to his only living relative, his nephew William Snell. The only evidence Maude has to support her claim is a cancelled check signed by Mr. Snell. The check for $200 was a loan from Maude to her employer. Maude wrote on the back of the check, "to be repaid whenever convenient in view of promise to leave me estate," and Mr. Snell endorsed the check below this statement.

DEMURRER

DR. WILLIAM SNELL ISN'T DISPOSED TO SETTLE Maude Crowley's claim to part of his uncle's estate or to pay for her claimed services. His attorney therefore files a *demurrer* to Mr. Green's complaint. The demurrer says in effect that even assuming Miss Crowley did work for Mr. Snell all those years, and even assuming she has a purported "writing," this still doesn't add up to a true legal claim. Therefore Miss Crowley's complaint should be dismissed.

The court will decide this issue at a hearing, probably before a Law and Motion judge who hears the arguments by both sides and makes a decision. Note that this is *not* a trial. There is no jury; there are no witnesses.

It is strictly a technical matter to settle the question of whether Mr. Green has a legally stated case. If he has not properly stated his case, he may be given a chance to amend his complaint, so that it meets legal requirements. Then Dr. Snell's attorney might be able to demur again; this could conceivably happen several times. Or the judge might decide that no matter how Green changed the wording, he couldn't come up with a legally sufficient complaint. In that case, the judge would sustain the demurrer without leave to amend, which means that Green is out of court before he begins.

We'll assume the judge does just that: he rules against Mr. Green. But the lawyer can and does take his case to the court of appeal. Here three appellate court justices listen to his arguments, and also to the arguments of his opponent. They read the briefs each side files with them. They research the law for themselves, and then they rule.

Here, fortunately for Miss Crowley, the court of appeal decides the judge in the lower court was wrong. Mr. Green's complaint was good; if he can prove his allegations, he can win a judgment.

ANSWER

NOW FOR THE FIRST TIME Mr. Green gets a flicker of interest from Dr. Snell. His attorneys tell Green that without admitting anything, he's willing to pay Miss Crowley the $200 she claims Mr. Snell borrowed from her. Mr. Green replies: "Your offer is not acceptable. We note that the inventory of Mr. Snell's estate shows net assets of $347,000. We are willing to accept half this amount, over a period of time, and in such amounts as may be negotiated by us." Dr. Snell loses interest.

Now Dr. Snell's attorney must act; he has a limited time to file an *answer* with the clerk of the court. The answer either admits or denies each of the allegations in Maude Crowley's complaint, and it mentions the reasons why Dr. Snell believes Maude is not entitled to part of his uncle's estate. And if the facts warrant, Dr. Snell's attorney may also file a *cross-complaint* that would

include any claims Dr. Snell may have against Miss Crowley. If he did this, Mr. Green would then have the option of demurring to the cross-complaint or filing his answer so that each side has an answer to the other side's claim.

DISCOVERY

ONCE THE ANSWER OR ANSWERS ARE IN, the case is at issue. That is, it can be set for trial. However, there are some optional steps the attorneys for either side may take first. These are called *discovery* procedures. Either attorney may take the deposition of parties on the other side. This would mean that Dr. Snell's attorney would require Miss Crowley to appear before a notary public, and with a stenographic reporter present, answer questions. Her answers would give the attorney a good idea of how she will answer his questions at the trial. It would give him a chance to study the evidence in advance and to figure out how best to meet it. Sometimes the questions may be presented in written form; then the answers are written also.

Other discovery methods include orders requiring someone to produce books, records and documents for inspection. Or to submit to physical, mental or blood examinations. Or to require the opposing party to admit or deny facts involved in the case. Or to admit or deny the genuineness of documents.

In our example, Dr. Snell's attorney would almost certainly demand inspection of Miss Crowley's check, and Mr. Green would, with appropriate precautions, allow him to look at it. Just as certainly, Snell's attorney would have a questioned-document examiner present to look at the check and perhaps make photographic or chemical tests to see if the signature is really Horace Snell's.

PRETRIAL CONFERENCE

ALL THESE PRELIMINARIES TAKE TIME--months and sometimes years, particularly where the stakes are high. Are we ready for trial yet?

Not necessarily. There's another procedure called a *pretrial conference*. California judges may order these by their own motion. And they must order one when it is requested by at least one of the parties. The idea is that the attorneys get together with the judge, either in chambers or open court, in an attempt to streamline the proceedings. The court attempts to fix the issues in dispute. It may have the attorneys stipulate or agree to undisputed facts, rule on amendments to pleadings, accept admissions of fact and genuineness of documents, fix dates for the termination of discovery, and settle other matters which might shorten the actual trial time without harming either party. The end product of the conference is a *pretrial order*, which brings out the matters still in dispute that have to be resolved by trial.

PRETRIAL MOTIONS

LET'S LOOK AT SOME OTHER PRETRIAL PROCEDURES that might have been used in the matter of *In re Snell*--but weren't.

In some cases it might be possible for the defendant to MOVE TO QUASH SERVICE OF SUMMONS. He would say, in an affidavit filed with the court, that although someone claimed to have served him properly, this wasn't the fact. He may be able to show that someone else was taken for Harry Hanover and served. Or that the document was in some way defective. A motion to quash summons is often little more than a delaying tactic, since the other side simply serves the defendant again. However, such a motion can be important. The time during which a summons and complaint can be issued and served is limited. If the time has already run out, and the party is able to show he wasn't really served when they thought he was, he may not be subject to another summons.

Another pretrial motion is the MOTION FOR SUMMARY JUDGMENT. This is used when there is little or no dispute about the facts of the case. So why have a trial? The attorneys can argue any law that's involved with only the judge present and save a lot of time.

Instead of "live" witnesses, the facts are told in affidavit form by the opposing parties. The one making the claim says that there is no merit in the other side's defense. Or the person defending says there is no legally adequate claim against him. An example: You own a store. You sell merchandise to Fred Harmon over a period of time. Fred has only paid you a few dollars and now owes you $220. You put this in your affidavit, showing all dates, amounts of purchases, and dates of payments.

Fred says in his affidavit that he has paid, and is making payments, and doesn't owe you the amount in question. But he gives no particulars.

Plainly, the court is going to rule in your favor. The fact that Fred paid you something is beside the point; he still owes $220 and has brought up no facts to show that he doesn't. If your itemization was incorrect, it was up to him to at least allege he made payments that don't appear in your affidavit. To go to trial on such a poor showing of defense would be a waste of the court's time. Thus, summary judgments are used to get rid of unfounded suits in which there is no triable, material issue of fact.

Here's an example of still another kind of pretrial motion. You might sue a firm whose financial standing is rather shaky. So you would apply to the court for an ORDER TO PROTECT YOUR ABILITY TO ENFORCE A FINAL JUDGMENT, if you win. Such orders generally restrict the defendant's ability to dispose of or conceal property. Sometimes when you want to guard the defendant's property against sudden disposal, the court may appoint a *receiver* to maintain control over it. This is done most often in actions involving corporations going out of business.

One of the most important provisional civil remedies is the PRELIMINARY

INJUNCTION. Its purpose is to preserve the status quo pending the outcome of a lawsuit. Courts are generally reluctant to use this equity power and will do so only if you can show that you'll probably win a permanent injunction or if serious injury is likely to occur in its absence. Preliminary injunctions can only be granted after notice and a hearing are afforded to the person against whom it is being sought. Under truly urgent circumstances the court may grant a TEMPORARY RESTRAINING ORDER which immediately enjoins the defendant from acting, pending a hearing on the plaintiff's motion for a preliminary injunction. This order is based on a showing of need by the party seeking it. Because preliminary injunctions and temporary restraining orders may damage a defendant who later wins his case, the plaintiff is required to post security--prior to issuance of the orders--from which damages can later be paid.

To Trial

ONCE THE COURT RULES ON ALL THE PRETRIAL MOTIONS, the parties are ready to proceed to trial. And as we've said, the defendant is entitled to a trial by jury. But this right is not absolute. Failure to appear at the trial, failure to demand a trial by jury within five days after the case is set for trial, and failure to deposit with the clerk or judge a sum equal to one day's jury fees--$5 per person and 15¢ per mile transportation to the court--two weeks prior to trial all may result in a waiver of this privilege. The right may also be waived by oral or written consent of the parties.

It really gets complicated, doesn't it? Poor Miss Crowley probably thought that if her attorney filed suit one day, there'd be a trial within a few weeks, and she'd know whether she'd won or lost. Of course, this is not true. Miss Crowley's case might be held up for several months or, in some cases, up to two years. And either she or the other side might appeal the trial court's decision, and that would require briefs and oral arguments in the appellate court--perhaps even a rehearing. And then there might be even further appeals.

Actually only a small percentage of civil cases are appealed. The greatest number are settled by compromise before trial. Some cases "die on the vine" and are eventually dismissed for lack of prosecution. Some go on to trial, and the parties accept that decision as final.

In Miss Crowley's case, it is probable that at some stage before trial--possibly after the depositions--Dr. Snell's attorney will recognize that Miss Crowley has a strong case. If she wins at the trial, she might get judgment for a large slice of the estate. Half? A third? The attorney has to make some shrewd guesses. Then he'll offer Mr. Green something less than that by way of settlement. There'll be more and more bargaining the closer the case gets to trial; it isn't uncommon for cases of this kind to be settled even while the jury is being impaneled. When Miss Crowley agrees to an amount, she gets a check and the case is closed. However if Dr. Snell refuses to settle, the case eventually will go to trial.

Pretrial Criminal Procedure

JUST WHAT IS A CRIMINAL ACTION? The California Penal Code (section 683) says it is "a proceeding by which a party charged with a public offense is accused and brought to trial and punishment."

A criminal action must be prosecuted by the government in the name of the people; thus criminal cases are titled *State v. Davis* or *People v. Davis*. The State and the people are represented by the district attorney or one of his deputies in criminal proceedings in California.

RIGHTS OF THE ACCUSED

THE PROCESS BY WHICH AN INDIVIDUAL charged with a crime is accused and brought to trial includes such proceedings as his arrest, bail setting, arraignment, preliminary hearing, rearraignment in a superior court if he is held to answer to felony charges, and any number of pretrial conferences, motions and appeals. All of these proceedings are designed to safeguard the due process rights of the accused. And in all of these proceedings *the accused is presumed innocent until he is proved guilty.*

The procedural safeguards guaranteed to the accused are based on the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment extends these safeguards to all United States citizens; the Fourteenth Amendment guarantees these same rights to the citizens of all of the fifty states. The Fifth Amendment states in part: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . . " Thus the Constitution guarantees all citizens the rights:

--to notice of the charges against them;

--to bail;

--to be represented by counsel;

--to a public trial;

--to have a jury hear their case;

--to refuse to testify against themselves;

--to confront and examine their accusers; and

--to be tried only once for the same crime.

SAMPLE CASE

LET'S LOOK AT A SAMPLE CRIMINAL CASE. While each case is unique in terms of the people involved and the charges against them, the same legal procedures are used over and over again. And every defendant is guaranteed the same basic due process rights.

Alex Davis and Ed Johnson have been in a bar for several hours. As they drink, they become loud and profane. Around midnight they argue over who paid for the last round of drinks. Suddenly there's a pistol in Alex's hand; a report, a flash, and Ed is bleeding on the floor, while Alex stands over him--his pistol smoking.

Simple? Everyone in the bar witnessed the incident. As the officers take Alex into custody, he mumbles, "Had to do it. He wouldn't pay for the drinks."

Now it is likely that Alex will either hire a private attorney or be represented by a public defender. And his counsel may discuss the case with the district attorney and perhaps agree on a penalty which, if Alex accepts it and the judge approves it, will end this case.

But suppose Alex Davis pleads not guilty? Ten people saw the shooting. A man is dead, and Alex has confessed. Why not hustle him off to the state prison? Because every man is entitled to due process of law. Alex Davis is no exception.

ARREST

A CRIMINAL CASE BEGINS WITH AN ARREST. And the defendant's due process rights begin the moment he is arrested. The Miranda Warning* must be given at the time of arrest. An officer will say:

> *Mr. Davis, you have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer and have him present while you are being questioned. If you cannot afford a lawyer, you have the right to request the court to appoint one for you before you answer any questions. If you decide to answer questions now without a lawyer, you may refuse to answer any particular question or stop answering at all any time you wish to do so. Having been advised of your rights, do*

**Miranda v. Arizona, 384 U.S. 436 (1966). Recognizing that interrogation combined with ignorance can produce a form of coercion, the U.S. Supreme Court ruled that all suspects must be informed of their right against self-incrimination at the time of their arrest.*

you want to answer questions now before you talk to a lawyer? Do you understand each of the rights I have explained to you?

If the arrested person doesn't answer "yes," he hasn't waived his rights and his answers to questions may not be allowed in evidence later if his case goes to trial.

What if there had been no immediate arrest? Suppose Alex had fled the scene. Later, someone reports to the police that Alex is staying in a room at the Bayside Arms Hotel. Then the police would swear out a written complaint under oath before a judge. The officer would say there was probable cause to believe Alex had committed a crime. Then the judge would issue a warrant for Alex's arrest, and the police would take him into custody.

However, the judge is not a rubber stamp. He must be satisfied from the complaint that an offense has been committed and that there is reason--or probable cause--to believe the person named in the warrant is the one who committed the offense.

BAIL AND APPEARANCE

AFTER ALEX IS ARRESTED, HE'S BOOKED at the police station. Then unless the crime he is accused of is a very serious one, and there is danger of his escape, he's entitled to release on bail. The purpose of bail is to insure that a defendant will appear for trial and at the same time to allow him to remain free until the presumption of innocence guaranteed him by our judicial system is overcome by a criminal trial.

Most defendants are unable to post the full amount of bail required; normally they must engage a bail bondsman who, for a fee, will post the full amount of bail set by the judge. If the defendant subsequently fails to appear, the bail will be forfeited to the county. Many defendants cannot even afford the premium on a bail bond--usually 10 percent of the face amount. So they must stay in jail until their cases are decided. which may be several weeks or months.

Judges also have discretion to release people without bail if they can show the judge they are reasonably responsible and are likely to appear for trial. Such a release is called "on his own recognizance"--"O.R." In some larger counties "O.R." projects, supported by foundation grants, provide personnel to screen applicants for release without bail and to recommend to the court whether or not the applicant should be "O.R.'d."

ARRAIGNMENT

WHETHER OR NOT A DEFENDANT is released on bail or his own recognizance, the law requires that he be taken before a magistrate without unnecessary delay. In California arraignments are generally held within forty-eight hours after the

arrest. Normally the accused's initial appearance will be before a municipal or justice court judge.

The purpose of the arraignment is: (1) to identify the defendant; (2) to inform him of his constitutional rights; and (3) to advise him of the charges against him. The judge will also ask the defendant if he can afford to hire an attorney to represent him; if he cannot, the judge will appoint counsel for him. In most counties there are public defenders to provide counsel for indigents. In counties without such an office, the courts assign local counsel. The county pays most of the expense of public defenders and assigned counsel; the state contributes 10 percent of the cost.

During the arraignment the judge will ask the defendant how he pleads to the offense charged against him: guilty or not guilty? If several charges have been filed against the defendant, he will plead separately to each charge.

--If the defendant pleads *guilty to a misdemeanor*--a charge *not* punishable by imprisonment in a state prison--the court may impose sentence at this time, or the judge may continue the case so that he may obtain and study the probation report before imposing sentence.

--If the defendant pleads *not guilty to a misdemeanor*, the judge will set the date for trial, within thirty days after arrest, unless the defendant waives his right to a speedy trial to give his counsel more time to prepare.

--If the defendant pleads *guilty to a felony* charge, he must be represented by counsel unless the judge believes he has intelligently waived his right to representation.* The defendant who pleads guilty is transferred to superior court for sentencing, and a judge of that court decides what punishment should be imposed.

--If the defendant pleads *not guilty to a felony* charge, a date is set for his preliminary hearing in a municipal or justice court. A preliminary hearing will usually be held within five days of the arraignment, unless the defendant waives the hearing.

In Alex Davis' case the defendant pleads not guilty and requests a preliminary hearing.

PRELIMINARY HEARING

THE PURPOSE OF A PRELIMINARY HEARING is to determine: (1) if a crime has been committed; and (2) if there are reasonable grounds to believe the defendant

**A case is now pending in the U.S. Supreme Court in which the defendant claims that a man does not have to be represented by counsel if he does not wish to be; this suit claims that a judge does not have the right to force a defendant to accept counsel.*

was involved in the crime. During the preliminary hearing the defendant with his attorney appears before a judge--in municipal or justice court--and is confronted with the evidence to support the charges against him. Generally the State, acting through the district attorney, presents its case against the defendant, but the accused presents no witnesses at this time. The defense, however, does have the right to cross-examine the State's witnesses.

According to statute the judge *must*--if the defendant requests him to do so--hold a closed preliminary hearing. This statute gives the accused an opportunity to protect his right to an impartial jury by preventing dissemination of prosecution testimony by the news media prior to trial.

In our case, *State v. Davis*, the district attorney will carefully prepare his case against Alex Davis. He'll want every scrap of evidence he can find. He will, for example, check the identity of the dead man. Was he really Edward Johnson? Whose pistol was it? Does the rifling on the bullet that killed Mr. Johnson match the rifling in the pistol barrel of Alex's gun? How about powder marks on the victim's skin? How about nitrate particles on the hand that presumably fired the gun? Is the wound consistent with the distance and direction of a firing from Mr. Davis' position? Is there *any* possibility a third person could have fired the fatal shot? What about a window or other opening through which someone else might have fired? Or escaped?

The district attorney will also dig into the past relationship between Alex and Ed. What might have been behind the quarrel--if anything? Money? A woman? Had they ever quarreled before? Had there been prior threats? Damning as appearance seems to be, a truly professional district attorney will take nothing for granted. He will be scrupulous about preserving the arrested man's rights. He'll know that a flaw in the criminal proceedings, some inadvertent denial of due process, can very well lead to a lost case, no matter how strong the evidence seems to be.

Once the district attorney has presented his case to the court, the judge has two alternatives for its disposition:

--*He may dismiss the case and release the defendant if he feels the evidence against him is insufficient or was illegally obtained.*

--*He may hold the defendant to answer and order the case transferred to superior court for arraignment and trial at a later date.*

In our sample case, the court finds that there is enough evidence to believe that Alex Davis shot and killed Edward Johnson, and Alex is sent back to jail to await his arraignment in superior court.

REARRAIGNMENT

IF AFTER THE PRELIMINARY HEARING the defendant is bound over to superior court to stand trial, he is once again arraigned. And again the purpose of the

arraignment is:

--To identify the defendant as the party named in the information filed by the district attorney or the indictment filed by the grand jury;

--To make sure the defendant is aware of his constitutional rights of due process;

--To make certain that the defendant is represented by counsel, unless he has intelligently waived this right;

--To present a copy of the information or indictment to the defendant's attorney; and

--To have the defendant plead to the charges against him.

Usually the defendant will plead either guilty or not guilty to the charges listed in the complaint. However he might plead *nolo contendere*--or no contest--which is the same as pleading guilty insofar as it gives the court power to enter judgment against the defendant and sentence him. However, this plea does not establish the fact of guilt for any other purpose. For example, this plea may not be used against the defendant as an admission against interest in any civil suit growing out of the act on which the criminal prosecution was based. In addition to the foregoing pleas, the defendant might also plead not guilty by reason of insanity.

MOTIONS

BEFORE A CRIMINAL TRIAL BEGINS the defense attorney may file any number of motions with the court. For example, he might enter a motion to strike prior convictions charged in the information or indictment. Suppose Alex Davis, the defendant in our hypothetical murder case, was convicted five years ago for assault with a deadly weapon. His attorney may move to have the court strike this conviction form Davis' record so that it cannot be considered by the judge when he imposes sentence in this case. And if the judge can't take the prior conviction into consideration, Alex may well get a lighter sentence than he might otherwise. Prior convictions are usually attacked on technical grounds; for example, his attorney might charge that Alex's confession to the assault charge was made only after the police threatened him.

The judge may hear the motion either at the mandatory pretrial conference or at a separate motion hearing. If he accepts the motion, Alex's prior conviction cannot be considered during his trial or sentencing. If the judge denies the motion, Alex's attorney may appeal the decision. And if an appellate court agrees to rehear the motion, this action will take some time--delaying the case for months or even a year.

Other motions are made and heard in much the same way as the motion to strike prior convictions. These motions include:

--Motion to set aside. This is a motion to dismiss the information or indictment for procedural or factual deficiencies. The defense attorney may charge that the district attorney's complaint, based on evidence taken at the preliminary hearing, is not sufficient to prove what it charges.

--Motion to suppress. This motion seeks to suppress any evidence which was illegally obtained and is, therefore, not admissible in court. This evidence may have been obtained as the result of an illegal police search or arrest.

--Motion to dismiss due to lack of speedy trial. This motion is usually made by the defense when the prosecution delays the start of the trial unnecessarily while it prepares its case.

--Motion to dismiss due to denial of due process. This motion may be made when the defendant did not receive the proper Miranda Warning at the time of his arrest.

--Motion for insanity hearing. This motion may be made any time prior to judgment. If the defense moves for such a hearing, all proceedings must stop until the court--usually the judge acting without a jury--determines whether or not the defendant is competent to stand trial.

Once all the motions are heard and decided, either by the trial court or an appellate court, the trial can proceed.

INFORMATION

AS MENTIONED EARLIER, a felony case reaches the trial court either by an information filed with the trial court by the district attorney or by an indictment filed by the grand jury. The information is a form, filed with the court by the district attorney, saying for example that Alex Davis:

> *was accused by the District Attorney of the crime of felony, to wit: violating section 189 of the Penal Code of the State of California, committed as follows: that said Alex Davis did on or about the 2nd day of June, 1973, at the City of San Francisco, then and there commit an act of murder.*

The technical requirements of the district attorney's information are quite simple. The law says that the statement of the offense may be made in ordinary and concise language sufficient to give the accused notice of the offense of which he is accused.

What happens when the district attorney files for a more serious offense than the accused person's acts seem to call for? The D.A. has this right. But that doesn't necessarily mean the accused will be overpunished. In such instances, the judge may reduce the charge to a less serious offense, even over the district attorney's protestations.

INDICTMENT

THE ALTERNATIVE METHOD FOR BRINGING CRIMINAL CHARGES against someone is by grand jury indictment.

The grand jury is composed of nineteen people--twenty-three in Los Angeles County--impaneled and sworn to inquire into all public offenses committed or triable within a particular county. It hears charges, may produce witnesses, and may accuse. An indictment requires at least twelve votes of the nineteen possible.

After being sworn, the grand jury ordinarily retires to conduct its inquiries in secret. Proceedings are conducted in secret on the grounds that in many cases, an investigation is conducted but an indictment never returned. And in such situations the person investigated is protected from unnecessary public disclosure of the details of the inquiry, or even the fact that such a probe was undertaken. The only persons who may be legally present at the grand jury proceedings are the reporter, the district attorney, and, if needed, an interpreter. No member of the grand jury may disclose the statements made or votes taken.

The grand jury hears only the district attorney's evidence concerning the accused. There is no opportunity for the accused to cross-examine the prosecution's witnesses or to present his own evidence. The accused may appear at the hearing--*if* he is called as a witness. He cannot bring his attorney into the hearing room, but may leave to confer with him during questioning.

In California, the grand jury must have evidence which appears on the surface to be enough to convict; otherwise the indictment may be quashed by the judge when it reaches the court. Public and news media access to grand jury transcripts is regulated by a 1971 Penal Code amendment which provides that the transcript is not open or available to the public until ten days after its delivery to the defendant. At the end of that period, the transcript is available to the public unless the court--on its own motion or that of a party--determines there is a "reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial. . . ." Under such circumstances, that part of the transcript is sealed until the defendant's trial has been completed. (Penal Code sec. 938.1).

Trial Procedure

BY THE TIME A CASE GOES TO TRIAL, a number of issues will already have been settled through a variety of discovery proceedings, motions and perhaps appeals. This means that, first of all, the identity of the parties involved will have been established--was the Burt Douglas named in the complaint the Burt Douglas of 2138 Greenleaf Street, who was driving the car that ran over Betsey Jones? In addition, was the missing cash, the bag of heroin, the bloody knife, legally seized by the police? Was the arrest proper? Was the suspect informed of his constitutional rights? Is the defendant represented by counsel? Have both sides, under proper court orders, displayed their evidence and named their witnesses? While the details may vary, general trial procedures are similar in both criminal and civil cases.

Officers of the Court

THE JUDGE PRESIDES OVER THE TRIAL. If the case is to be tried before a jury, the judge rules on points of law dealing with trial procedure, presentation of evidence, and the substantive law of the case. The jury determines the facts. If the case is to be tried without a jury, the judge finds the facts in addition to his other duties..

The BAILIFF keeps order in the courtroom. He takes charge of the jury as instructed by the judge, and will take custody of the defendant at the end of the trial if he is to be imprisoned immediately. It is also the bailiff's duty to see that no one talks with or attempts to influence the jury in any manner.

The COURT CLERK calls the court to order before each stage of the proceedings and administers the oath to each witness who is called to testify. The clerk's office maintains records of all judicial proceedings, and newsmen should remember that the clerk's office is a good place to look for records concerning a case.

The COURT REPORTER records all of the courtroom proceedings, including testimony of witnesses, objections made to the evidence by the attorneys, and the rulings of the court on any motions made during the proceedings.

ATTORNEYS are also officers of the court whose duties are to represent their clients and to present the evidence on their behalf so that the judge or jury may reach a just verdict or judgment. The attorney's role is partisan; he is an advocate.

Trial Briefs

IN A FEW TYPES OF CRIMINAL OR CIVIL CASES, the facts may be pretty much taken for granted--perhaps most of them will be *stipulated* or agreed to in advance. But in the majority of cases there are a number of disputed facts, and the law regarding the case may be quite complicated. So after the pretrial procedures are completed and the case is about to be tried, the attorneys for each side may file trial briefs with the court. They are not required to do so. These briefs simply anticipate what facts are to be proved and state what law applies to those facts.

Judge or Jury?

THE ACCUSED IS ENTITLED TO A TRIAL BY JURY unless he waives this right and asks to have his case heard and decided by a judge. While the defendant has a legal right to a trial by jury in a criminal or civil case, he does not have an absolute right to waive a jury in a criminal case. He may say he doesn't want one, but the judge may overrule him if the judge believes that the defendant is not sufficiently competent to understand the charges against him or what it means to waive a jury trial.

Jury Trial

CRIMINAL AND CIVIL JURIES are referred to as *petit* juries. Criminal cases are heard by twelve jurors; however, attorneys in civil cases may stipulate to a smaller number of jurors--usually eight. Besides the regular jurors, one or two alternates may be selected to hear a felony case if the judge deems it appropriate. The alternate jurors hear the evidence just as the regular jurors do, but they do not participate in the deliberations unless a regular juror becomes disabled.

If the defendant elects to have a jury, his attorney will be quite concerned that these laymen be able to hear his case as fairly as possible. Before the trial starts the attorney will check over the list of all prospective jurors who might possibly hear his client's case. If the case is a major one, the attorney will want to check the background of each person summoned for jury duty. For example, in a case involving a drunken driving manslaughter charge against a prominent citizen, the attorney will want to know if jurors belong to organizations opposed to liquor or to churches or other organizations which prohibit drinking. Or, conversely, if they are employed by distilleries, liquor stores or taverns.

When the prospective jurors are seated in the jury box, the judge will conduct the *voir dire* or questioning of these people. His examination may be followed by specific questions asked by the attorneys:

Are there any of you in the jury box who believe that merely because charges have been made by the prosecution, the accused person here is necessarily guilty?

Are there any of you who might be prejudiced in favor of technical witnesses--because they are called by the State--which might affect your ability to act as fair jurors?

If you find the actions of the defendant personally distasteful, could you set aside your personal feelings and follow the instructions of the court as to how the evidence should be considered?

The selection of a fair and impartial jury is not always an easy matter. In a civil or criminal trial, each of the opposing attorneys will try to eliminate those potential jurors who might be biased against the side he represents. Until recently, the judge would make a brief statement about the nature of the case, ask a few questions, for example, "Are you related to or acquainted with any of the attorneys or the parties here?" and then would turn further questioning over to the attorneys. Today the judge does most of the questioning; the attorneys are more restricted. The purpose of this change is to speed up the jury selection process which, in major cases, can run several days or weeks.

All of the questions are designed to find out if any of the prospective jurors is biased; that is, whether there is "existence of a state of mind . . . in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either part . . . . " (Penal Code, sec. 1073). If the questions elicit that frame of mind, the court will dismiss the juror.

Any number of prospective jurors may be *challenged and dismissed for cause*--that is, for some reason that indicates bias or prejudice. In addition, each side has a limited number of *peremptory challenges* which permits it to excuse a juror without naming a reason. In a criminal case when the offense is *not* punishable by death or life imprisonment, the prosecution and defense are entitled to ten peremptory challenges each. In capital cases or cases when a life prison sentence is mandatory, both sides are entitled to twenty peremptory challenges each. In civil cases the plaintiff and the defendant are each entitled to six peremptory challenges.

There are ideas prevalent among trial attorneys that people in certain occupations or social classes tend to have built-in biases. Many believe, for example, that jurors of middle and lower economic and social classes and minority jurors are better for the defense because their own experiences make them champions of the underdog. On the other hand, the prosecution may seek establishment-oriented jurors--for example, military officers, executives and upper class individuals--who supposedly tend to be more authoritarian, more intellectual, and more inclined to rely on technical or expert evidence.

TRIAL STARTS

AFTER THE JURY HAS BEEN IMPANELED AND SWORN, the judge will say, "Proceed, counsellors." Both civil and criminal cases begin with a statement by the plaintiff's counsel or district attorney--the side bringing the action. The purpose of the opening statement is to tell the court and jury what issues are involved in the case and what counsel anticipates the evidence will show after it has been presented. However, the opening statement is *not* itself evidence, and it should not be considered as such by the jurors or the press.

Only on rare occasions will the defense attorney make his opening statement directly following the prosecution's statement, although he is entitled to do so. He will almost always wait until he begins his defense. Strategically, he feels the limited advantages of an early opening statement are more than outweighed by the hazards. If he makes an early statement, he assumes the burden of proving something to the jury--a burden that by statute rests with the prosecution.

CALL THE FIRST WITNESS

THE PROSECUTION CALLS THE FIRST WITNESS, who is sworn in by the court clerk and seated. In a criminal case such as the drunken driving case mentioned earlier, this first witness will probably be the police officer who made the arrest. He will testify on direct examination by the district attorney that he was patrolling a certain stretch of highway. His attention was caught by an automobile weaving from lane to lane. The officer will testify that he stopped the car and asked the driver to display his license, that the driver's face was flushed, that his eyes were red and bleary, that he spoke thickly and had an alcoholic breath. And the officer will say the accused was informed of his rights and taken to a highway patrol station where a chemical test was made to determine the alcohol content of his blood.

When the district attorney or prosecuting attorney finishes his direct examination, the defense attorney has the right to cross-examine the witness. Usually he will do this by isolating each factor of the examination-in-chief and by trying to draw admissions from the witness that one or more of the factors he testified to might have been caused by another reason than that which the witness stated. For example, the defense attorney might ask the officer if the fifty mile-an-hour wind on the night of the accident could have caused the defendant's car to weave from lane to lane. Or if the defendant's thick voice couldn't have been caused by his terrible cold. However, if the results of the blood alcohol test show that the defendant was intoxicated, this cross-examination may not be too effective.

After cross-examination, the attorney who originally called the witness has the right to ask questions on re-direct examination. This re-direct examination covers new matters brought out on cross-examination and generally is an effort to rehabilitate a witness whose testimony on direct examination may have been weakened by cross-examination.

OBJECTIONS

THE PURPOSE OF THE TRIAL is to get at the truth, to consider only evidence that is relevant to the crime charged against the defendant. If the indictment or information says the defendant murdered his wife the prosecution cannot bring in evidence that he murdered someone else, even though he really did. But there are times when other crimes may be brought in to show a *pattern of behavior*: if the defendant had disposed of five of his previous wives by drowning them in the bathtub, this evidence may be allowed to show he probably did the same to his sixth wife.

Attorneys "keep each other honest" by objecting when the evidence or testimony offered is not precisely relevant. The laws of evidence are complicated; there are exceptions to the rules, and exceptions to the exceptions. The arguments over whether a question is or is not proper can sometimes be long, technical and boring. But to a person accused of a crime or to the corporation that stands to lose thousands of dollars, the court's ruling on the admissibility of evidence may be vital.

The district attorney may object to questions asked by the defense, hoping to keep out some item of evidence that seems improper to him. But his stake is not as great as that of the defense. The district attorney cannot appeal after the trial has started and the defendant has been placed in jeopardy. He doesn't need to "make a record," except insofar as needed to present his case properly. The defense attorney, on the other hand, does have the absolute right of appeal. And if he fails to make strong, timely objections when he should, a court may later decide he acted incompetently. Many appealed convictions have been upheld on evidence that could have been excluded altogether by appropriate objection at the trial. When appellate courts don't reverse convictions which were founded on weak or improper evidence, they are prone to say that defense counsel failed to make timely objection.

KINDS OF EVIDENCE

JUST WHAT IS EVIDENCE? California law says it "is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

These means are:

1. Testimony of witnesses. *People see, hear, feel, taste and smell--and they can tell what happened in terms of their senses. "When the fire broke out, I felt the heat and smelled a strong odor of kerosene."*

2. Writings. *Letters, deeds, bills of sale, agreements, leases, guarantees, books, statements, records, wills, court papers--all these, and more, may be evidence for certain purposes.*

3. Other material objects presented to the senses. *These may include objects which have a direct bearing on the case. For example, a gun found in the accused's locker, similar to the one used in a crime. Or illegal narcotics seized during a drug raid.*

4. Knowledge of the court. *That is, the court will take judicial notice of some things, such as the meanings of English words and phrases, existing laws, measures of time, geographical divisions, and other well-established information.*

5. Presumptions. *These are deductions which the law says may be made from particular facts. The jury makes the deductions. For example, if someone deliberately commits an unlawful act in order to injure another, there is a presumption that he did so maliciously and with guilty intent.*

DIRECT AND CIRCUMSTANTIAL EVIDENCE

SOME CASES REQUIRE *DIRECT EVIDENCE*. This means that an eyewitness has actually seen or heard the events he describes in court. Or that someone has brought in an original document which proves the fact in question. For example, Uncle Willie's nurse says he left her half his fortune. To prove her case, she must bring in his will, showing that he really did name her as an heir.

Another kind of evidence considered by the court is *circumstantial evidence*, sometimes referred to as indirect evidence. This type of evidence is used when the court infers or accepts a fact based on a set of known or proved circumstances. An example: Harry is holding a smoking pistol, George lies dead in a pool of blood. No one actually saw Harry shoot George. But from the circumstantial evidence, it may be inferred that Harry fired the fatal shot.

HEARSAY EVIDENCE

THE GENERAL RULE OF LAW is that the judge will not allow the jury to consider *hearsay evidence*. Hearsay is an off-the-stand statement made by someone who is not in court to take the stand and be questioned. Hearsay is often brought up in court when a witness attempts to tell the judge and jury about something he heard someone else say, not what he himself saw or heard.

People often speak carelessly in idle conversation. "He told me he had to get some money in a hurry," someone might report, when in fact what the person really said was he had to hurry to the bank to cash a check. The first version might sound like a motive for burglary. The second indicates only a perfectly legitimate errand. Errors like this--often unintended--cause the courts to reject hearsay.

There are some *exceptions* to the hearsay rule. One of these occurs in a

situation in which the person quoted is under some special compulsion to speak truthfully. Say a witness comes on the scene just as the victim, dying of a gunshot wound, speaks: "Carl Smith shot me. He said he was going to kill me, and he has finally done it." Here the victim is dying and he knows it. There is a strong presumption that he is going to tell the truth. Or at least that he will say what he believes to be true. In such cases, the judge may admit the hearsay evidence.

Records made in the usual course of business--such as checks, deeds, wills, public records--plainly can't be sworn in or cross-examined. So technically they, too, are hearsay. But they are also exceptions to the hearsay rule. A proper foundation must be laid first--that is, the person offering the documents must show where they came from and, in effect, authenticate them as being what they seem to be. The court may then accept this form of hearsay evidence.

Expert Witnesses

COURTS WILL ALLOW EXPERT WITNESSES TO TESTIFY about things that ordinary witnesses cannot testify to. They will permit this when the expert is qualified by a showing that he has special "technical" knowledge, training or skill concerning the matters to which he testifies. Courts will also permit expert testimony when, even though the jury knows all the facts, the conclusions to be drawn from them depend on opinions or knowledge of experts in the field.

For example, two versions of the same holographic or handwritten will may be introduced in evidence, and the jury may be asked to examine the two samples of handwriting--one genuine and the other one forged. The jury won't know for sure which will is real. But the expert witness will be able to testify, having compared both wills with some other document written by the decedent, as to which will is genuine. An expert witness in a different situation might be an automotive engineer who can tell the court whether or not a car was working properly at the time it was involved in an accident. A doctor is often an expert witness, fixing the time and cause of death or the extent of someone's injuries. These expert witnesses play an important part in the presentation of evidence to the jury.

Burden of Proof

IF YOU FILE A CIVIL SUIT AGAINST SOMEONE--say, for money he owes you or damage he did to your car when he rear-ended it--you must prove your case by a *preponderance of the evidence*. That is, your evidence must be a little stronger than the other side's.

Let's say Arthur Davis has Ben Smith's note for $1,000 for money he loaned him. Ben has only paid him $200, and he refuses to pay another cent. Arthur offers the note in evidence. He also offers his records which show the $200 credit. Ben's evidence is pretty skimpy. He says he doesn't know anything about

the note. He tells the judge, "It's a forgery; he just wants to make an easy $800." Maybe Ben's testimony is perfectly truthful. Maybe he really didn't sign the note. But Arthur has the promissory note, and if his evidence that Ben really did sign it is a little more convincing than Ben's to the contrary, then Arthur would have proved his case by a preponderance of the evidence.

REASONABLE DOUBT

HOW ABOUT A CRIMINAL CASE? The defendant in a criminal case is presumed to be innocent until he is proved guilty. Since the State prosecutes criminal cases, it is up to the State to prove the defendant guilty *beyond a reasonable doubt*.

Reasonable doubt "is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." It is that state of the case, after the jurors have compared and considered all of the evidence, at which they cannot say they feel "an abiding conviction, to a moral certainty, of the truth of the charge." (Penal Code, section 1096). Our judicial system requires jurors to be this morally certain to prevent conviction and imprisonment of innocent people.

DEFENSE

WHEN THE DISTRICT ATTORNEY HAS PRESENTED ALL his witnesses and evidence, he will say, "The People rest."

Now it's the defense's turn. Often the first step here is for the defense attorney to move for a *directed verdict*. With this motion, made out of the hearing or presence of the jury, he will try to demonstrate that the plaintiff or the prosecution doesn't have enough evidence to go to the jury. Or that the evidence it does have is insufficient to allow the jury to find a preponderance of the evidence or to find guilt beyond a reasonable doubt. Motions for directed verdicts are made almost routinely, and almost as routinely, denied.

Following denial of the motion, the defense will usually call witnesses and present evidence, and the prosecuting attorney or attorney for the plaintiff will cross-examine the defense's witnesses. But this procedure is not invariable. The attorney may simply say, "The defense rests." Then the district attorney or attorney for the plaintiff will sum up his case followed by the defense summation, in which the attorney will concentrate on the weaknesses of the plaintiff's or the prosecution's case. Perhaps he will argue that the plaintiff failed to establish his client's liability for the accident. Or that if a crime was committed, the prosecution failed to prove beyond a reasonable doubt that it was committed by the defendant.

More than likely, however, the defense will call witnesses including--sometimes--the defendant himself. The defendant cannot, of course, be forced to

take the stand in a criminal case. But he may do so if he wishes, and if his attorney agrees. The attorney may very well not wish to see his client subjected to cross-examination, in return for the dubious benefit of having him solemnly declare under oath that he is innocent.

When both sides have completed their cases--or rested--they will sum up to the jury. Or to the judge, if there is no jury. Counsel may in exceptional situations waive their summations, but this rarely happens. The purpose of these closing arguments is to give each attorney time to summarize his case and to attempt to convince the judge or jury to make a decision on behalf of his client or position.

JURY INSTRUCTIONS

FOLLOWING THE SUMMATIONS, the judge will instruct the jury. His instructions will be very precisely worded, and most are taken from standard jury instructions that have been court-tested in the past. The attorney for each side may propose instructions for the jury; the judge has discretion to accept, reject, or modify these instructions. Sometimes the court's decision is appealed when one side feels the judge has given an instruction that does not apply to the facts of the case. Should the case be appealed, the attorney for that side will almost certainly ask for a review of the particular instruction to which he objects. If the trial judge did commit a prejudicial error, perhaps confusing the jury or causing it to come to a faulty verdict, the appeal court may reverse the case and send it back for a new trial. In such an event, it would be up to the plaintiff or the prosecution to decide if it will call for a new trial.

VERDICT

AFTER IT HAS BEEN INSTRUCTED, the jury is led to the jury room by the bailiff. Its members elect a foreman and start their consideration of the evidence, following the judge's instructions. When the jurors come to a decision--this may be a matter of an hour or it may take several days--they advise the judge they have reached a verdict. When the jurors return to the courtroom, the foreman hands the written verdict to the clerk, who reads it to the court. In a criminal case, the jury may find the defendant not guilty, or guilty, or guilty only of certain charges. They may also find him guilty of a lesser crime than that charged by the prosecution. The jury verdict in a criminal case must be unanimous.

In a civil case the jury's verdict is on the disputed issues or facts in the case. The jury may make a general finding or verdict, pronouncing in favor of the plaintiff or the defendant. Or the jury may make a special verdict, in which it determines only the significant facts of the case and leaves the judgment up to the court. If the plaintiff seeks money damages in a civil suit, the jury must determine the amount of the damages to be awarded when it finds for the plaintiff. The decision in a civil case does not have to be unanimous; a

three-fourths majority may arrive at a verdict.

If the jurors cannot arrive at a decision, the jury is "hung" and the case must be retried. Because retrials are expensive time- and moneywise, the judge will often ask the hung jurors to go back to the jury room, reconsider the evidence and try to reach a verdict if at all possible.

Motions After Verdict

AFTER THE VERDICT HAS BEEN PRONOUNCED, but before the judgment has been entered, the losing attorney may make several motions, the most common of which is a motion for a new trial. A new trial is a rehearing of the same case before another jury. An attorney will ask for a new trial if he believes the judge erred in his rulings during the trial; if misconduct by the jury prevented fair consideration of the case; if there was insufficient evidence to sustain the jury's verdict; if the damages given by the jury were excessive and not supported by the evidence presented at trial; or if new material evidence has been discovered that might change the jury's verdict.

Judgment and Sentencing

THE JURY'S VERDICT IS INEFFECTIVE UNTIL the judge enters the judgment upon the verdict. The judgment is the final determination--subject to action by an appellate court--of the rights of the parties in an action or proceeding. In a civil damage suit the judgment might read: "It is, therefore, ordered and adjudged that the plaintiff recover the sum of $5,000 from the defendant."

In a criminal case if the defendant is found guilty, he will not be immediately hauled off to jail by the sheriff. Most likely he will continue to be free on bail. The judge will--in any event--call for the probation report before sentencing the defendant. When he does sentence he may impose a fine; he may send the defendant to a county jail for up to one year; he may send the defendant to state prison for an indeterminate length of time; he may suspend sentence on the condition that the defendant doesn't commit another offense; or he may place the defendant on probation.

Appeal

IN AN APPEAL THE HIGHER COURT REVIEWS the actions of the trial court to see whether any alleged errors, pointed out by counsel in an appellate brief, affect the validity of the trial. Errors may have been made in the trial procedure, or in interpreting and applying substantive laws. In a civil suit, either party may appeal to a higher court. In a criminal case, the right to appeal is generally available only to the defendant. When the verdict is "not guilty," the State doesn't have a right to appeal. The accused is discharged, and under

the rule of double jeopardy, may never be tried again for the same offense--not even if completely indisputable evidence turns up to prove his guilt.

Legal Bibliography

YOU'VE JUST INTERVIEWED LOCAL LAWYER Edwin Ryan on the subject of indeterminate sentences. "It's a good practice," Mr. Ryan contends, "to have the parole board keep close watch on a person in prison. The board can then decide the term that person should serve according to his conduct and attitude as a prisoner. That's better than piling the responsibility on a judge who simply doesn't have the data to set a fair and definite sentence at the time he must do so."

"On the other hand," says Mr. Ryan, "the parole boards can get a little arbitrary themselves and forget there's such a thing as cruel and unusual punishment. Like, for instance, the recent *Lynch* case where the board set, in effect, life imprisonment for a simple exposure case."

And then Mr. Ryan takes off on another phase of the indeterminate sentence.

Later, looking over your notes, you wonder about that "cruel and unusual" punishment case to which the lawyer referred. Maybe that case could be the subject of an entire article. You decide you ought to read it. But when you call Mr. Ryan to ask about it, his secretary tells you he is out of town and won't be back for a week.

Now how do you go about looking up that case for yourself? Or any other case, or statute, for that matter?

Here are a few suggestions on looking up law that may help you in your newsgathering. This is far from a complete course in legal bibliography. It is intended to help you find a case or a statute you want to know more about. But it won't tell you if your case or statute is still in effect--that is, if it's still "good law." And it won't tell you what the case or statute means. We'll mention later how you can check to see if the case or statute is current law, and remember--don't *ever* cite a case or statute that you haven't checked. A case might have been modified, reversed or overruled in a later decision by the same court; a statute might have been amended or repealed during a later session of the Legislature. If you aren't sure what your case means, don't refer to it in any article until you've checked with an attorney. You will probably want to do most of your research in the county law library. The law librarian will be able to help you find the material you are looking for, so don't hesitate to ask for assistance when you need it.

CALIFORNIA CASES

SUPREME COURT DECISIONS

CALIFORNIA HAS TWO APPELLATE COURTS. The highest state court of appeal is the California Supreme Court. Its decisions are to be found in a continuing series of volumes titled *California Reports*. When the Supreme Court was established in 1850, its first decisions were published as *1 California Reports* or "1 Cal." From 1851 to 1934, some 220 volumes of these reports were printed in consecutive order, i.e., *2 California Reports*, *3 California Reports*, etc. Then in 1935, for no particular reason, the publisher began a second series of the reports called *1 California Reports, 2d Series* or "1 Cal. 2d." This series of reported decisions includes seventy-one volumes issued from 1935 to 1970. A third series was begun in 1970 as *California Reports, 3d Series* or "1 Cal. 3d," and will continue for an indefinite period of time. In each of these series the large number of opinions published each year caused the publisher to issue more than one volume per year.

A court or lawyer referring to a particular case in one of those volumes would cite it as *State v. Smith*, 2 Cal. 220. This means "People of the State of California against Ferdinand Horace Smith," to give the case its full title. "2" refers to the volume of the reports that includes the opinion. "Cal." indicates this is a California Supreme Court decision. And the figure following "Cal." gives the number of the page on which the opinion starts. If the citation read 2 Cal.*2d* 220, you would find the opinion on page 220 of volume 2 of the *California Reports, 2d Series*.

COURTS OF APPEAL DECISIONS

CALIFORNIA'S LOWER APPELLATE COURT is officially called the Courts of Appeal. You will find approximately the same system used with California Courts of Appeal cases as with Supreme Court cases, although the appellate court decisions are recorded in a separate set of reports called *California Appellate Reports* and usually cited as "Cal. App.," "Cal. App. 2d," or "Cal. App. 3d," depending on which series of the reports is being referred to.

Tip: if you look at a page in a particular volume and don't find the case you need, recheck your citation. You may have overlooked the "App." The *California Appellate Reports* numbering system works like this:

1 Cal. App. (1905) through 140 Cal. App. (1934)

1 Cal. App. 2d (1934) through 276 Cal. App. 2d (1969)

1 Cal. App. 3d (1969) through --- Cal. App. 3d (present)

ADVANCE SHEETS

VERY RECENT CASES AREN'T FOUND IN BOUND VOLUMES. To locate these decisions you must go to the *Advance Sheets*. They're usually kept on the shelf following the last bound volumes of the series. They're paperbound, and the Bancroft-Whitney series, for example, is published every ten days so you can check very recently decided cases. In the *Advance Sheets*, you'll find *both* the Supreme Court and the Courts of Appeal opinions. They're printed in one volume on two colors of paper. But they're separated in the hardcover volumes later. Several sets of *Advance Sheets* will be accumulated by the publisher to form one bound volume.

What if you need an opinion in a case that was filed only yesterday? Then go to the Clerk of the Supreme Court, or Clerk of the Courts of Appeal, and you can obtain a mimeographed copy of the case.

PARALLEL REPORTERS

IN ADDITION TO THE OFFICIAL *CALIFORNIA REPORTS* discussed above, reported cases of the California appellate courts can also be found in the *Pacific Reporter* and the *California Reporter*.

The *Pacific Reporter* was first published in 1884 as a unit of the National Reporter System containing all reported cases of the California Supreme Court and Courts of Appeal, and including some decisions not reported officially. In 1960 a new unit called the *California Reporter* was added to the National Reporter System; it contains all officially reported appellate cases. Since 1960 the only California appellate decisions included in the *Pacific Reporter* have been those of the Supreme Court.

The numbering and pagination of the two *Reporter* series is different from that in the *Reports* series. So check your citation carefully to be sure you are looking in the right series. In some more recent Supreme Court citations you'll see references to the *California Reports*, the *California Reporter* and the *Pacific Reporter*. For example, *People v. Medina*, 7 Cal. 3d 30, 101 Cal. Rptr. 512, 496 P.2d 433 (1972). In this parallel citation the last figure is the year of the decision. "Cal. Rptr." is the official abbreviation for the *California Reporter* series, and "P." refers to the *Pacific Reporter*. This same case may be located in any of the three reports series.

READING THE OPINION

SOME COURT DECISIONS ARE BRIEF. Others may run many pages. It's helpful to know a bit about the organization of most modern opinions so you can find your point faster and more painlessly.

Usually the first page of the newer opinions starts with:

1. *TITLE of the case, the names of the defendant and the plaintiff;*

2. *DOCKET NUMBER, the reference number assigned to the case by the court;*

3. *DATE OF DECISION;*

4. *SUMMARY of the case prepared by the editor;*

5. *HEADNOTES, or short numbered paragraphs prepared by the editors to indicate points of law and legal issues treated in the case. Throughout the opinion following the headnotes you'll see headnote numbers, usually in boldface brackets. The law or legal principle cited in the numbered headnote paragraph is discussed in the opinion where the bracketed number occurs;*

6. *COURT OPINION, which starts with the name of the justice who wrote it. Thus WRIGHT, C.J., in caps, indicates an opinion written by Chief Justice Donald R. Wright. Generally the opinion starts with a statement of the FACT SITUATION, which tells what the case is about. Then follows a legal analysis of the points of law brought up by the attorneys. There may be several points, some technical, others not. For example, one attorney may raise the point that certain evidence should have been excluded and say that in any event, a life sentence for selling marijuana is improper. The opinion will then include a discussion of the exclusionary rule as it applies to this case. The discussion will most likely cite a number of other similar cases, and state what the facts were in each and what the court decided. After reviewing these earlier decisions, the judge in the current case will indicate whether or not the lower court's decision follows the established law;*

7. *COURT DECISION, or ruling of the court. The court may make several kinds of rulings. It may say, for example, that the case should be dismissed. Or it may send the case back to the lower court for a new trial. Or it may affirm and uphold the trial court's decision as it stands.*

It's important, particularly in criminal cases, to know with what kind of a proceeding you're dealing. You'll find this information at the beginning of the opinion, usually in the first sentence: "This is an appeal from a trial had in Orange County Superior Court. . . . . " Or, "This case reaches us on a writ of certiorari from Santa Clara." Thus at the end of the case if the court says "reversed and remanded," and the case was a trial appeal, you will know the lower court's ruling was upset.

Sample Case

[Citation]

(#2) (#3)
[Crim. No. 16351. In Bank. Dec. 20, 1972.]

(#1) THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL THOMAS, Defendant and Appellant.

(#4) SUMMARY [Prepared by Editor]

Defendant was convicted of taking a vehicle without the owner's consent in violation of Veh. Code, § 10851, in a trial, without a jury, before a judge who, within two years of commencement of the action, had been employed as an assistant district attorney in the county of trial. (Superior Court of Los Angeles County, No. A-601728, William L. Ritzi, Judge.)

The Supreme Court affirmed, rejecting, without discussion, contentions of insufficiency of evidence and lack of effective assistance of counsel, and holding that the judge's employment as assistant district attorney did not come within Code Civ. Proc., § 170, subd. 4, disqualifying a judge who has been employed "as attorney or counsel for any party" within two years before commencement of the action. In so holding, the court pointed out that the offense had not been committed until more than a year after the judge had ceased to be employed as assistant district attorney, and that it would be unreasonable to assume that his prior representation, in the county, of such an artificial and generalized party as the "People" would bias him for two years in all criminal cases tried in the county. (Opinion by Burke, J., expressing the unanimous view of the court.)

(#5) HEADNOTES [Prepared by Editor]

Classified to McKinney's Digest

(1) **Judges § 33—Disqualification—Effect of Statutory Provisions.**—The object of Code Civ. Proc., § 170, subd. 4, relating to disqualification of judges, is not only to guard jealously the actual impartiality of the judge, but also to insure public confidence. The statute should be liberally construed with a view to effect its objects and to promote justice.

(2) **Judges § 45—Disqualification—Grounds—Judge Acting as Attorney or Counsel.**—A judge's former employment as an assistant district attorney within two years before commencement of a prosecution for taking a vehicle in violation of Veh. Code, § 10851, did not make him "attorney or counsel for any party," within Code Civ. Proc., § 170, subd. 4, disqualifying a judge "when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding . . . ," where the offense was not committed until more than a year after his elevation to the bench; it would be unreasonable to assume that his prior representation of the "People" would result in a conscious or unconscious bias on his part for two years in all criminal cases in the county in which he had served as assistant district attorney.

[See **Cal.Jur.2d**, Judges, § 40.]

COUNSEL

Clifford Douglas, under appointment by the Supreme Court, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Herbert L. Ashby and Edward A. Hinz, Jr., Chief Assistant Attorneys General, William E. James, Assistant Attorney General, William R. Pounders, Geoffrey S. Cantrell and Howard J. Schwab, Deputy Attorneys General, for Plaintiff and Respondent.

#6 OPINION [Prepared by Court]

BURKE, J.—A court, sitting without a jury, found Michael Thomas guilty of violating Vehicle Code section 10851 (taking vehicle without owner's consent with intent permanently or temporarily to deprive owner of its possession) and sentenced him to prison.[1] He appeals, contending that the trial judge was disqualified, that the evidence is insufficient to support the conviction, and that the failure of his counsel, the public defender, to object to certain evidence deprived him of the effective assistance of counsel. We have concluded that none of the contentions can be upheld and that the judgment should be affirmed.

---

[1]The court acquitted him on other counts charging grand theft (Pen. Code, § 487, subd. 3), and receiving stolen property (Pen. Code, § 496).

Defendant contends that Judge William Ritzi, who tried the case, was disqualified because Judge Ritzi was an assistant district attorney for Los Angeles County within two years before the commencement of the action.[2] Defendant relies upon the provision in Code of Civil Procedure section 170, subdivision 4, disqualifying a judge who has been employed "as attorney or counsel for any party" within two years before the commencement of the action.[3]

(*1) Section 170 should be liberally construed with a view to effect its objects and to promote justice. (Code Civ. Proc., § 4.) The object of section 170 "is not only to guard jealously the actual impartiality of the judge but also to insure public confidence." (See *Tatum* v. *Southern Pacific Co.*, 250 Cal.App.2d 40, 42 [58 Cal.Rptr. 238, 25 A.L.R.3d 1325].)

The mere fact that Judge Ritzi was an assistant district attorney in Los Angeles County within two years before the commencement of this action would neither impair his impartiality nor undermine public confidence. (2) The crime was not even committed until over a year after his elevation to the bench. It is thus apparent that he would not have obtained any personal knowledge of the crime while employed as an assistant district attorney, and it would be unreasonable to assume that his prior representation in Los Angeles County of such an artificial and generalized party as the "People" would result in a conscious or unconscious bias on his part for two years in all criminal cases in that county.[4] We are therefore satisfied

[2]Pursuant to Evidence Code sections 452, subdivision (h), and 459, we may take judicial notice that for several years immediately before his elevation to the bench in August 1969 Judge Ritzi was an assistant district attorney for Los Angeles County. (See Cal. Courts and Judges Handbook by Kenneth Arnold (1969 Supp.) p. 235.) The Court of Appeal advised the parties of its intent to take judicial notice of the foregoing (see Evid. Code, § 459), and no objection was made thereto.

The information was filed in the instant case in the Los Angeles County Superior Court in January 1971. The complaint is not part of the record on appeal but evidently was filed shortly after December 25, 1970, the date of the alleged crime.

[3]Code of Civil Procedure section 170 provides: "No . . . judge shall sit . . . in any action . . . 4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or *when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding.* . . ." (Italics added.) The italicized clause was added to the section in 1927. (Stats. 1927, ch. 744, p. 1403, § 1.) Section 170 applies to criminal, as well as civil, proceedings. (See, e.g., *Tatum* v. *Southern Pacific Co.*, 250 Cal.App.2d 40 [58 Cal.Rptr. 238, 25 A.L.R.3d 1325]; *People* v. *Pratt*, 205 Cal.App.2d 838, 841 [23 Cal.Rptr. 469]; see generally Witkin, Cal. Criminal Procedure (1963) p. 258, and 1 Witkin, Cal. Procedure (2d ed. 1970) pp. 337-357.)

[4]A public defender who is elevated to the bench would have represented individual defendants only and thus manifestly would not be disqualified under the provision in question from sitting for two years in all criminal cases in the county in which he had been a public defender.

(*[This #1 corresponds to the #1 in the Headnotes]

that Judge Ritzi's former employment did not make him "attorney or counsel for any party" within the meaning of the provision in question.

In support of the claim that Judge Ritzi was disqualified defendant cites *People* v. *Crappa*, 73 Cal.App. 260, 261 [238 P. 731]. There the judge who revoked the defendant's probation and sentenced him to prison had been the district attorney at the time the information was filed and as such had appeared for the People at the arraignment and at the hearing of defendant's application for probation, and it was held that the judge was disqualified under the provision in section 170 disqualifying a judge who in the action has been attorney for either party. That case manifestly differs substantially on its facts from the present one.

Since Judge Ritzi was not disqualified on the basis relied upon by defendant, it is unnecessary to consider whether defendant waived the asserted disqualification by failing to file a statement in the trial court objecting to the judge or to raise the matter in any manner in the trial court.

Defendant's remaining two contentions concerning the alleged insufficiency of the evidence to support the conviction and the asserted lack of the effective assistance of counsel have been examined and are wholly without merit.

(#7) The judgment is affirmed.

Wright, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Sullivan, J., concurred.

[Dec. 1972]

FINDING A CASE

LET'S GO BACK TO MR. RYAN'S *LYNCH* CASE. He said it was recent--but didn't specify further; five years is "recent" to some lawyers. You know it's a criminal case, so its title will either be *State* (of California) *v. Lynch*, or *In re Lynch*.

We'll take a chance on its being very recent and go to the latest *Advance Sheets*. These, you remember, supplement the bound volumes of reports. On each paper cover will be a list of the cases reported in that book of *Advance Sheets*; often the list will be continued inside on the front or back cover. And the cases will be divided into Supreme Court cases and Courts of Appeal cases. You don't know in which court the *Lynch* case was heard, so you'll have to scan both lists. The case is not in the latest *Advance Sheets*? Then go back one, and one more, until you come to the bound volumes. The bound volumes also contain the names of cases on their title pages. You may continue digging back a volume at a time until you find your case, or you can cut across to another method of research.

THE DIGESTS

YOU'RE STILL LOOKING FOR THE CITATION to *Lynch* so you can find it in the *California Reports* or the *California Appellate Reports*, and read it. This brings us to the case digests. In California there are two competing digests: *West's California Digest* and *McKinney's New California Digest*.

Each of these digests covers *all* written reported decisions of the California courts since 1850. The arrangement of these digests is alphabetical by legal topic, and within a topic such as "Contracts" you will find digested briefly all reported cases dealing with this subject. In addition each set has volumes consisting of tables of all reported cases arranged by "Plaintiff" and "Defendant."

Using the Table of Cases unit of *West's Digest* in this instance we find that one section lists cases by "Defendant's Names" and the other by "Plaintiff's Names." In our example, let's try "Defendants." *Larabee . . . Loomis . . . Lynch*. But the case you find is *Gardner v. Lynch*. And we know the case we're after must be either *State v. Lynch* or *In re Lynch*.

This particular volume of cases was printed several years ago, so that the most recent cases won't appear in the main section. But all the digests, including the indices and tables, are kept up to date by pocket part supplements. So look in the back of the Table of Cases volume. See that pamphlet-sized booklet held in place by a tab which slides into the book itself? That's the update. Follow the same procedure, looking in the "L's" under "Defendants."

In re Lynch, with the citation given as 8 Cal. 3d 410. You've found it, and from here on it's easy. You simply go to the shelves containing *California*

Reports (Supreme Court) and look among the more recent volumes--they all follow in numerical order. "1 Cal. 3d, 4 Cal. 3d, here it is, 8 Cal. 3d." Just open to page 410 and there is the case.

CALIFORNIA LAWS

THE CODES

ANY WORKING LAW LIBRARY will have a set of the California Codes. These are compilations of California laws, which run from "Agricultural" to "Welfare & Institutions." Among the codes more commonly used are the Civil Code, Code of Civil Procedure, Penal Code, Government Code, Education Code, Business and Professions Code, Corporations Code, and many others. There are competitive sets of codes. Bancroft-Whitney's *Deering's California Codes* is one. Another is West Publishing's *West's Annotated California Codes*.

USING THE CODES

MOST OF THE STATUTE LAW you'll be concerned with at state level is contained in the volumes of the California Codes. These volumes include the laws that are made, amended or repealed each year by the California Legislature.

If you have the number of the code section you want to look at, it's very simple to find. You want "Pen. C. A. 190." You have only to locate the Penal Code, find the right volume (there are several on the Penal Code, each indicating on the cover which sections it contains), and turn to section 190--which defines murder. To be sure you have the latest definition, check the pocket part at the back of the book.

Suppose, though, you want to know the legal definition of murder but don't have the section number.

There are two approaches. Perhaps you already know which code your section is in--murder is plainly to be found in the Penal Code. The last volume of the Penal Code contains an index of all criminal sections. Look under "Murder" and you'll find several references: definition, degrees, punishment and so on. All you want is "definition," and you will be referred to section 190.

But suppose you don't know which of the various Codes contains the law for which you are looking. You do know there's a law someplace that says a married minor may make a valid contract. However you don't know if that section is in the Education Code, Financial Code, Health and Safety Code, or Welfare & Institutions Code--to mention just a few possibilities.

So you check the Index to the entire set of Codes; it consists of four volumes. Do you look under "Children and Minors," "Contracts," "Marriage," or

Sample Statute

reviewed in denying the writ, the record showed no abuse of discretion. People v Superior Court (1968) 69 C2d 491, 72 Cal Rptr 330, 446 P2d 138.

§ 1386. Nolle prosequi abolished

The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.

#1

Legislative History:

Enacted 1872. Based on:

(a) Criminal Practice § 598 (Stats 1851 ch 29 § 598 p 279), which read:

"Neither the Attorney General or the District Attorney shall hereafter discontinue or abandon a prosecution for a public offense, except as provided in the last section."

(b) Stats 1850 ch 119 § 630 p 323.

(c) NY Code Crim Proc § 672.

#3

Collateral References:

Cal Jur 2d Attorney General §§ 6, 7, Criminal Law § 236, Dismissal, Discontinuance, and Nonsuit § 68, District and Prosecuting Attorneys § 13.

McKinney's Cal Dig Criminal Law §§ 222 et seq.

21 Am Jur 2d Criminal Law §§ 512 et seq.

#4

Law Review Articles:

Disposition for criminal cases through agencies other than jury. 2 SCLR 97.

Speedy trial for potential defendant. 5 Stan LR 95.

Annotations:

Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity. 66 ALR 1378.

Power of court to enter nolle prosequi or dismiss prosecution. 69 ALR 240.

#5 Notes of Decisions

Prior to the enactment of this section and of § 1385, the prosecutor alone had authority to dismiss a criminal action, but these sections transfer such authority to the court. People v Romero (1936) 13 CA2d 667, 57 P2d 557.

Fact that this section and § 1385, providing that court may order prosecution dismissed and abolishing entry of a nolle prosequi, were necessary to give to courts power traditionally vested in prosecutors demonstrates that common-law rule relating to nolle prosequi was not abrogated by general language of Constitution vesting "judicial power" in courts. People v Sidener (1962) 58 C2d 645, 25 Cal Rptr 697, 375 P2d 641 (overruled on other grounds People v Tenorio (1970) 3 C3d 89, 89 Cal Rptr 249, 473 P2d 993), app dismd 374 US 494, 10 L Ed 2d 1048, 83 S Ct 1912.

Nolle prosequi has been abolished and plenary authority to dismiss criminal action has been transferred to court; thus, court, for purposes of order of dismissal, takes charge of prosecution and acts for People. People v Superior Court (1962) 202 CA2d 850, 21 Cal Rptr 178.

With certain exceptions entry of nolle prosequi has been abolished. People v Parks (1964) 230 CA2d 805, 41 Cal Rptr 329.

what? The editors have made your research easier by cross-referencing the Code Index, and you will find references to the section for which you are looking under both "Children and Minors" and "Contracts." In this case your Code reference number is Civil Code, section 25, and all you have to do is look it up in the proper volume of the Civil Code.

READING THE CODE SECTION

WITHIN THE PROPER VOLUME the Code section itself is printed in large type. Following the law in smaller type is material pertaining to the section you are reading. The terminology differs between the two sets of California Codes, but basically such material includes:

1. *LEGISLATIVE HISTORY -- shows you in what year the statute was enacted, previous statutes on which it may have been based, and when the statute was amended.*

2. *CROSS REFERENCES -- direct you to other sections, relating to the statute in question, that can be found in the California Codes.*

3. *COLLATERAL REFERENCES -- direct you to pertinent sections in other legal reference books.*

4. *OTHER REFERENCES, less often included -- Attorney General's Opinions, Law Review Articles, Annotations, Words and Phrases, Trial Techniques, Proof of Facts.*

5. *NOTES OF DECISIONS -- give you one-paragraph summaries of specific cases, with citations, relating to the section which precedes them.*

6. *SUGGESTED FORM -- gives you a sample indicating the format of the written procedure described in the statute.*

FEDERAL CASES

U.S. SUPREME COURT DECISIONS

TO FIND FEDERAL CASES, you use a system which is quite comparable to California's. Where California Supreme Court cases are printed in *California Reports*, the United States Supreme Court cases are printed in the *United States Supreme Court Reports*, usually cited as "U.S." Publication started in 1789 and has continued since then without interruption. However the early volumes bore the name of the court reporter at that time, so the first four volumes of U.S. Supreme Court cases are cited "Dallas" or "Dall." These volumes are the equivalent of 1-4 U.S. The next nine are called Cranch, followed by Wheaton, Peters, Howard, Black and Wallace. In 1874, the practice of calling all succeeding volumes "U.S."

was adopted. Since 1921 the Government Printing Office has published the *United States Supreme Court Reports*.

This series of reports is cited, for example, as *Harmon v. Tyler*, 273 U.S. 668 (1927), indicating case title, volume, reports, page, and year of decision.

There are several commercial reprint editions of the original *United States Supreme Court Reports*. One is known as *U.S. Supreme Court Reports, Lawyers' Edition*, cited "L. Ed." or "L. Ed. 2d," indicating the second series. Another competitive set of reports is the *United States Supreme Court Reports*, cited "S. Ct.," which is another unit of the National Reporter System published by West Publishing Company. By means of West's ingenious "key system" a lawyer can find related cases in any other system of regional or state reports that are published by West--for example the *Pacific Reporter* and the *California Reporter*. In any event all reports of U.S. Supreme Court decisions will provide you with basically the same information in the same order as do California Supreme Court decisions.

U.S. Courts of Appeals Decisions

LIKE CALIFORNIA'S COURTS, the Federal system is arranged on three levels. As previously mentioned, the highest level is the United States Supreme Court. The intermediate level includes eleven Federal judicial districts, within which the U.S. Courts of Appeals operate.

California is in the Ninth Circuit, which also includes Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam. The U.S. Courts of Appeals review cases that come to them from United States District Courts--the Federal trial courts. They also review the rulings made by a variety of agencies, such as the Tax Court, Federal Trade Commission and the National Labor Relations Board.

The decisions of the Courts of Appeals are published in the *Federal Reporter*, and are cited--depending on the series--as "Fed." or "Fed. 2d." Some old cases are cited to the now nonexistent Circuit Courts of Appeals Reports, abbreviated "C.C.A." This series has been discontinued, but you may occasionally run across such a citation.

U.S. District Courts Decisions

THE LOWEST LEVEL of the Federal court system includes the ninety plus United States District courts. They have broad jurisdiction to try cases involving constitutional law or violation of Federal laws, such as counterfeiting, interstate securities cases, crimes on Federal property, and suits between citizens of different states.

Federal District Courts do not prepare opinions for every case they try.

But when they do, these cases are reported in the *Federal Supplement*, cited "Fed. Supp."

CHECKING THE LAW

BEFORE YOU CITE A CASE OR STATUTE it is IMPERATIVE that you make certain it is still current. A decision made by the U.S. Supreme Court in 1868 may still be good law--binding on all the courts of the land. However, another decision made by the Court in 1968 may already have been modified or reversed by a more recent decision. Similarly, Congress may have passed a law in 1968, only to amend or repeal it during the next session. There is no way of knowing the "state" of a case or statute without first checking on its current validity. *Shepard's Citations* is the series of publications which will help you determine how the law stands TODAY.

Shepard's Citations, which began publication in 1873, prepares and continually updates a series of volumes explaining the subsequent history of just about any case or statute you might want to research. *Shepard's* various publications cover all the reported decisions of the United States courts and those of the various state courts. Other volumes include the statutes enacted in the United States Code and the various state codes. The publications of particular interest to you will be those citing United States Cases, California Cases and California Statutes.

Each *Shepard* publication is issued annually in hardcover form. Publications are also updated throughout the year with a quarterly softcover edition and periodic paperbound editions. When you use *Shepard's* to find out what's happened to a case or statute, always check the current hardcover edition and the most recent softcover and paperbound supplements as well.

Shepard's will give you a lot of information about your case or statute; this information is coded in an abbreviated or shorthand form. For instance, *Shepard's* will give you a complete list of every other case which has cited your case since it was decided; this includes citations by Federal and state courts. *Shepard's* will also tell you which opinions of the attorney general, law review articles, and legal annotations--if any--have cited your case. And most important--*Shepard's* will tell you how these later decisions treated your case. For example, you can tell if your case has been affirmed, modified, or reversed on appeal to a higher court. Or you can tell if your case has been criticized, questioned, or overruled in the opinion in a more recent case.

To use *Shepard's* it is necessary to learn the major abbreviations and special procedures it employs in presenting its material. The procedures may seem complicated at first, but once you've checked several cases or statutes, they become routine. Those reporters who do legal research should make an effort to learn the *Shepard* procedures; they are summarized in a 33-page booklet available from Shepard's Citations, Inc., Colorado Springs, Colorado 80901.

As time-consuming as all of this may sound, it is perhaps the most important part of your research. Quite simply, you wouldn't want to mention a case in an article only to have a local attorney call and tell you it was overruled five years ago.

SECONDARY SOURCES

LEGAL ENCYCLOPEDIAS

YOU WON'T ALWAYS WANT to look up a specific case. Many times you'll want to get a general idea--an overview--of what the law is on a particular topic. Lawyers sometimes call this "reading around the law."

Say, for example, you want some background information on estate taxes. Or the rights of a finder of lost property. Or the use of injunctions against popular artists and sports figures. Or state control of milk prices. Or the rights and duties of physicians, dentists and nurses.

For a reporter there are two major sources that treat legal subjects fully, and a shorter work for "quickie" reference.

CALIFORNIA JURISPRUDENCE

PROBABLY MOST VALUABLE FOR YOU is *California Jurisprudence*, now beginning a third edition. It is popularly known as "Cal. Jur." The second edition consists of fifty-six volumes plus a "General Index" and "Table of Cases Cited," and is arranged in encyclopedic form. Older volumes are constantly updated with pocket parts and sometimes with complete replacement editions. Some ten volumes of the third edition have now been published; this edition will gradually replace the current one.

In "Cal. Jur." you'll find general articles dealing with all the major fields of law, as well as many of the minor ones--including such topics as Spite Fences, Abandonment, Battery and Alienation of Affections. The lengthier articles have to do with such subjects as Constitutional Law, Automobiles, Equity, Contracts, Landlord and Tenant and Crimes.

The arrangement of the individual articles is relatively uniform. There is a detailed index at the beginning of each topic keying you to the section in which you're interested. The first few paragraphs tell you what the article covers--and what it does not cover. Generally the index will refer you to other articles on those subjects it doesn't cover.

The initial paragraphs of each article tell something of the historical background of the topic, then the article gets down to the basic principles of the law. The last part of the article generally covers the more technical aspects

of bringing suit, pleading and practice.

You'll find volumes following the main work designed to help you find what you're looking for. There's the four-volume "General Index," a three-volume "Table of Cases Cited," and a "Table of Statutes Cited" in volume 56.

Corpus Juris Secundum

THE OTHER MAJOR WORK IS NATIONAL IN SCOPE. It is called *Corpus Juris Secundum* and is cited "C.J.S." Here you'll find many of the same titles of articles as you'll find in *California Jurisprudence, 2d.* But the articles will cover other states and jurisdictions, not just California. You'll also find subjects that aren't included in the state publication--for example, Copyrights and Patents, Customs Duties and Federal Taxation--all of which are based on Federal statutes. The format of *Corpus Juris Secundum* is similar to that of "Cal. Jur. 2d"; it is encyclopedic, it has detailed articles on a wide variety of subjects, and it has separate volumes for indexes and tables of cases.

Witkin's Legal Summary

FOR A QUICK REVIEW that summarizes the major points and leading cases on a legal subject, try *Witkin's Summary of California Law.* Subjects are broken down by major categories--Contracts, Constitutional Law, Crimes, Real Property, Workmen's Compensation, Taxation, Community Property, and so on. You have to know, of course, that a question of landlord and tenant relationships would be in the section on Real Property. Or you can use the index at the back of the last volume. Witkin is very concise, but for a fast look at a particular point, it is excellent.

Additional Sources

THIS CHAPTER IS DESIGNED to give you an introductory knowledge of legal bibliography--enough to help you find the legal topic, case or statute in which you're interested. But the subject is vast, and it is impossible to do more here than give you a brief background.

There are, in addition to the topics already covered, a number of other legal sources you may wish to consult from time to time. For example, you may wish to take a look at the *Constitution of the State of California*--a long and complicated document made no less so by the addition of amendments and initiative measures that didn't become ordinary laws. The California Constitution, with all of its amendments, may be located in annotated form in both sets of California Codes. *Deering's California Codes* includes it as two volumes at the beginning of its series, while *West's Annotated California Codes* includes it as three volumes

arranged alphabetically within the series.

Other sources you might wish to refer to are the little-known interstate treaties, which have the effect of law. A treaty may settle a border dispute or regulate the use of waters common to two or more states. There are also city charters, city codes, and city ordinances, which may cover, for example, local building and zoning restrictions, traffic regulations, and some minor crimes not covered by state law. Obviously, not all county law libraries will keep copies of all of these documents, but you may want to check if you're searching for a particular item.

Another source to know about is the opinions of the various attorneys general, both state and Federal. These opinions usually relate to the construction of statutes and are based on some factual situation arising in the course of public administration. These opinions are "entitled to great weight," but they are not binding on the courts.

Another important area of law is that of administrative and departmental decisions. Any number of Federal and state agencies are busy grinding out opinions in their particular areas. Almost all are subject to judicial appeal, but relatively few actually are appealed. It's sometimes important to know what a public utilities commission or veterans' administration has decided, so there are a number of services that report these decisions. Among them, *U.S. Tax Court Reports*, *Treasury Decisions*, *National Labor Relations Board Decisions*, and others.

Law Reviews provide another body of background material for you. Most major law schools publish outstanding Law Reviews, which contain articles on important issues where the law may be changing or where recommendations for a change in the law are made. Among these Law Reviews are the publications of the University of California, Hastings College of the Law, Stanford, UCLA, USC, Harvard, Michigan, Yale and many others.

To find these articles, you may check the *Index to Legal Periodicals*, running from 1907 to the present, which is prepared by the American Association of Law Libraries. It is similar in format to the *Readers' Guide to Periodical Literature*, and most law libraries have this series.

Not all of the sources mentioned in this last section will be found in your local law library. So before beginning a futile attempt to find copies of the Attorney General's Opinions, ask the law librarian if they're available. And if you're looking for information and don't know where to start, again ask the librarian; he or she is there to assist you.

Free Press - Fair Trial Conflict

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . " The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . . "

The potential conflict between these two guarantees is frequently encompassed in the broad phrase "free press v. fair trial"--symbolizing a balancing task that in recent years has attracted increasing attention by the bench, bar, law enforcement agencies and the news media. Literature on the subject written during the past decade is voluminous.

The delicate balancing task necessitates, on the one hand, an understanding by the media of the rules of evidence and substantive law governing civil and criminal trials, and, on the other, an appreciation by other agencies of the technical problems, responsibilities and role of the news media.

The difficulty of resolving this dilemma has been widely recognized and commented on. " . . . free press and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them," the late Justice Hugo Black wrote in *Bridges v. California*. [314 U.S. 252, 260 (1941)].

Lewis F. Powell, Jr., then president of the American Bar Association (now an Associate Justice of the United States Supreme Court), reflected a similar view:

> *The beneficial influence of news coverage of the proceedings in the administration of justice is apparent. Untinted public criticism is one of the most effective checks on abuse of power. A diligent and enlightened press can afford substantial protection to a person accused of a crime. It can also protect society from having public order undermined by inefficiency, corruption or favoritism in the enforcement of our laws.*[1]

Chief Justice Donald R. Wright of the Supreme Court of California summarized the conflict: "The press naturally wants to report all the news that is fit to print, and at times its concern with the right of the accused to a fair and impartial trial may become secondary. On the other hand, individual trial judges, overly concerned with a fair trial, may underrate the right of the people to be fully informed."[2]

For generations the First and Sixth Amendments seemed to coexist with a fair degree of compatibility, although there was a procession of *cause celebre* cases, the more notorious being Thaw-White-Nesbit in 1907, Leo Frank in 1915, Hall-Mills in 1926, Gray-Snyder in 1928 and Hauptmann in 1935.

And California has had its share of "celebrated" cases--Stroble, Tregoff, Finch, Abbott, Barbara Graham, Ma Duncan, de Kaplany, Krieger, Manson, Sirhan Sirhan and Corona to recall a few.

Conflict in Focus

A COMBINATION OF FACTORS can be cited as responsible for bringing the free press-fair trial conflict more prominently into focus during the past decade or so:

1. In the 1960's the United States Supreme Court in a series of cases (*Mapp* in 1961, *Escobedo* in 1964, *Miranda* in 1966) considerably enlarged the defendant's rights in criminal proceedings. Prior to that time the judiciary seemed less sensitive to the rights of the accused with respect to "pretrial publicity." However, the phrase "trial by newspaper" was not uncommon and the courts certainly were aware of the problem.

2. Another series of Supreme Court decisions established in principle that excessive publicity could prevent a fair trial, i.e., *Irvin v. Dowd* in 1961, *Rideau v. Louisiana* in 1963 and *Sheppard v. Maxwell* in 1966. Also, in *Estes v. Texas* in 1965, the Supreme Court held that the impact of television cameras and lights in a courtroom setting was prejudicial to the conduct of a fair trial. The *Sheppard** and *Estes*** cases were to have significant influence on the relationship between the judicial process and the news media.

3. The parallel emergence of television, with its capacity to bring into the living room with unprecedented impact and intimacy newsworthy events, including such sensitive materials as confessions and prior criminal records. The Supreme Court in the *Sheppard* case referred to the "pervasiveness" of the modern technology. [384 U.S. at 362].

**Sheppard v. Maxwell*, *384 U.S. 333 (1966). In June, 1966, the U.S. Supreme Court in an 8-1 opinion, ordered a new trial for Dr. Sam Sheppard, convicted in 1954 of the murder of his wife, on the ground that "virulent publicity" had deprived him of his right to a fair trial.*

***Estes v. Texas*, *381 U.S. 532 (1965). The Supreme Court, in a 5-4 decision, reversed the conviction of Billie Sol Estes, Texas financier charged with swindling, on the ground his trial had not been fair as a result of televising a two-day preliminary hearing and part of the trial.*

4. The *Warren Commission Report* on President John F. Kennedy's assassination, raising the question whether publicity of that dreadful event would have made it possible for the accused to have received a fair trial.[3]

5. Members of the bar and judiciary became concerned by the increasing number of appeals of criminal convictions based on prejudicial publicity. More than 100 such cases were reported for the two-year span from January, 1963 to March, 1965.[4] The Supreme Court commented in the *Sheppard* case in 1966: "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent." [384 U.S. at 362].

These factors, combined with the spectre of a long, drawn-out trial going for naught, impelled the bar and judiciary to work toward standards that could contribute to resolving free press-fair trial problems.

THE REARDON REPORT

IN OCTOBER, 1966, after twenty months of study an American Bar Association Advisory committee on Fair Trial and Free Press, under the chairmanship of Justice Paul C. Reardon of the Supreme Judicial Council of Massachusetts, issued its report. Informal sessions with media representatives resulted in some modifications, and a final draft was approved by the ABA House of Delegates in February, 1968.*

THE SHEPPARD MANDATE

THE ABA COMMITTEE FELT IT WAS UNDER THE LASH not only of the Warren Commission remarks but, more potently, the direct language of the Supreme Court in *Sheppard*.

The *Sheppard* case is an extreme example, of course, of the free press-fair trial problem. The decision, while specifically declining to place any direct limitations on the news media, was--by way of its guidelines--to be far-reaching in its influence and impact. It handed down policies the lower courts could not ignore.

The Supreme Court observed:

**Part I relating to the conduct of attorneys was included in the revised Code of Professional Responsibility of the ABA applicable to all members of the association. Traditionally, canons of state bar associations parallel those of the national association. However, state associations are autonomous, and the State Bar of California deferred action on the Reardon recommendations pending discussions with the news media. (Infra, p. 24).*

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. . . . Secondly, the court should have insulated the witnesses. . . . Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. . . . Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and public officers. [384 U.S. at 358-360].

The editor of the *Cleveland Press*, Louis B. Seltzer, based his editorial attack on the belief that a "protective wall" had been put around Sheppard by local authorities, their purpose being "to hold the wall secure around Dr. Sam until public interest subsided." "I was convinced that a conspiracy existed to defeat the ends of justice, and that it would adversely affect the whole law-enforcement machinery of the county if it were permitted to succeed. It could establish a precedent that would destroy even-handed administration of justice."[5]

REARDON RECOMMENDATIONS

THE REARDON COMMITTEE CONCLUDED there was need for immediate steps by the bench, bar and law enforcement agencies to put their own houses in order. Its basic approach was to cut down on the flow of potentially prejudicial news at the source; its recommendations closely followed the guidelines set forth in *Sheppard*.

The committee's recommendations were divided into four parts: (1) those relating to the conduct of attorneys; (2) those relating to law enforcement officers, judges and judicial employees; (3) those for improving the procedural safeguards in criminal cases; and (4) those favoring a limited contempt rule against deliberate press interference in a jury trial.

The committee proposed use of the contempt power only against a person who disseminated an extrajudicial statement that was "wilfully designed" by that person to affect the outcome of a trial and that seriously threatened to have such an effect.

During the period from arrest to the end of a trial, the report *restricts* judges, prosecutors, defense attorneys, police and court employees from disclosing six categories of information: (1) prior criminal record; (2) existence or content of any confession; (3) outcome of any examinations or tests; (4) identity of prospective witnesses; (5) opinions as to guilt or innocence; and (6) possibility of a plea of guilty to the offense charged or a lesser offense.

The report permits release to the news media of the defendant's name; time

and place of arrest; resistance, pursuit and use of weapons; identity of the investigating and arresting officer or agency; description of physical evidence seized; the nature or substance of the charge; and reference, without comment, to public records in the case.

REMEDIES AVAILABLE

THE REARDON COMMITTEE REGARDED as an important part of its assignment the development of minimum standards with respect to traditional methods of attempting to guarantee a fair trial in the face of potentially prejudicial publicity.

Four principal "tools" or remedies are used:

1. *Change of venue -- motion before the trial to move its location;*

2. *Continuance -- motion before the trial to delay the proceeding to a later date;*

3. *Voir dire -- questioning of jurors at the outset of the trial to ascertain any bias or prejudice; and*

4. *Judge's instructions to jurors -- including admonishment not to read about or discuss the case.*

Another available remedy is to sequester the jury, but because of the expense, inconvenience and difficulty of obtaining a jury, this remedy is used only when it appears highly likely that prejudicial material will come to the attention of the jury. To help alleviate the irritation that seems inevitable by sequestration, the court usually explains that such practice is intended to shield jurors from harassment and to preclude any direct or indirect communications about the case. As a matter of policy, the jury is not informed which of the parties--prosecution or defense--requested that it be sequestered, unless it is at the instance of the court itself.

Concern has been voiced as to whether these corrective adjustments to the trial procedure adequately perform their function of expelling from a juror's consideration any nonjudicial or inadmissible information to which he might have been exposed. These traditional screening remedies, the *Reardon Report* said, "cannot carry the full burden" but are "nevertheless of considerable value." (p. 112).

In any preliminary hearing or other pretrial hearing, the Reardon standards recommend that a defendant's motion to close the hearing be granted, unless there is no substantial likelihood that dissemination of evidence or argument adduced at the hearing may interfere with the right to a fair trial. (Sec. 3.1). California's Penal Code section 868 has required since 1872 that the magistrate *must close* the preliminary hearing at the request of the defendant.

The most significant of the Reardon recommendations in respect to these "remedies" was that concerning change of venue and continuance. The committee recommended that either of these motions should be granted whenever it was determined there was a "reasonable likelihood that in the absence of such relief, a fair trial cannot be had." (Sec. 3.2).

A "reasonable likelihood" standard has since been incorporated into the California Penal Code (sec. 1033) for change of venue and was adopted by the California Supreme Court in 1969 in *Main v. Superior Court*, holding that a showing of actual prejudice is not required. [68 C.2d at 383]. A reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility.[6]

OTHER STUDIES

EVEN PRIOR TO THE *SHEPPARD* DECISION various Federal and state groups had taken steps to help cope with prejudicial publicity problems.

The U.S. Attorney General, for example, in April, 1965, issued a set of guidelines for the Department of Justice, differing from the recommendations of the *Reardon Report* in one significant aspect. Justice Department personnel would not *volunteer* details of an accused's prior criminal record, but since conviction records were maintained permanently as matters of public record the information would be made available upon "specific inquiry." These regulations were generally known as the "Katzenbach Rules," named after the Attorney General at that time.[7]

In October, 1971, the Department of Justice guidelines were revised by Attorney General John N. Mitchell to add restrictions regarding release of information pertaining to civil proceedings, and in criminal cases the guidelines were revised to ban discussion with reporters "from the time a person is the subject of a criminal investigation." Previously, Justice Department personnel were forbidden to give information to the news media only after a person had been arrested or indicted.[8]

In January, 1967, the American Newspaper Publishers Association released a 156-page report, generally taking the position that the judiciary had "procedural remedies present to provide effective safeguards" and that such remedies were "fully adequate to protect the rights of a defendant."[9]

Shortly thereafter, a committee of the Association of the Bar of the City of New York, under the chairmanship of Judge Harold R. Medina of the U.S. 2nd Circuit Court of Appeals issued its final report.[10] Taking a somewhat middle ground, the Medina Committee called for a volunteer approach and advocated a more restrictive view on the possible use of the contempt power against the press.

In response to the *Sheppard* mandate, the Judicial Conference of the United States, under the chairmanship of Judge Irving R. Kaufman, undertook two years of

deliberations and research and in September, 1968 issued a comprehensive set of recommendations, which came to be known as the *Kaufman Committee Report*.[11]

The *Kaufman Report*, implemented by "free press-fair trial" rules on local Federal district courts, set forth several specific guidelines, most taken directly from the *Sheppard* opinion.

The Kaufman guidelines varied from the Reardon standards on one significant issue. Regarding the exclusion of news media from preliminary hearings or other hearings outside the presence of the jury, the *Kaufman Report* said it recognized there were differences in the procedures and experiences of the state courts compared with Federal courts and that it would not make any recommendations on this problem "at this time."[12]

The *Sheppard* opinion had specifically declined to "place any direct limitations on the freedom traditionally exercised by the news media." [384 U.S. at 362, 363]. In recognition of this language, the Kaufman Committee's recommendations deliberately eschewed any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it said, was both unwise as a matter of policy and posed serious constitutional problems.

The Reardon and Medina Committees also rejected an expanded use of the contempt power to control the news media. The Medina Committee was of the view that "as a matter of constitutional law and policy . . . extension of the contempt power is neither feasible nor wise."

MEDIA REACTION

THE REARDON PROPOSALS PRODUCED SHARP CRITICISM by media spokesmen. Illustrative of the hard-line positions was that of the ANPA Special Committee in its 1967 report: "The people's right to a free press which inherently embodies the right of the people to know is one of our most fundamental rights, and neither the press nor the Bar has the right to sit down and bargain it away." (p. 1).

Adoption by the ABA of the Reardon recommendations in February, 1968, saw, at least briefly, a continuation of the heated debate.

The media were harsh in denouncing the "drastic" action of the bar association, generally criticizing the recommendations as an "overkill." In response, Justice Reardon decried the "massive" and "gross over-reaction" by the news media, stressing that his committee's recommendations did not restrict reporters from disseminating publicly any information developed on their own initiative or resources.

Principal criticism by the media was that while the *Reardon Report* recognized the importance of the "watchdog" function of the press, it seemed to take the position that the less said about crime news the better that justice would be served.

The Reardon Committee maintained such arguments were not valid in view of the nature of its proposed restraints. The proposals, the committee said, are:

> *carefully limited as to timing and are designed not to prohibit disclosures that assist in the administration of justice, that inform the public of the commission of crime or the apprehension of those accused of crime, or that relate to other matters not presenting substantial dangers of potential prejudice. The restrictions, it must be remembered, would apply only to those who by virtue of their profession or position in government have a fiduciary obligation to support the system they help to administer. The media would not be precluded from exposing what they regarded as improper conduct by such persons, and the Committee therefore does not believe that the restrictions would make it easier to "frame" a defendant or to "fix" a case. Moreover, it is especially significant that the restrictions would apply only to a given period in the criminal process; the question, then, is not <u>whether</u> certain disclosures may be made, but <u>when</u>.* (p. 78).

Any shortcomings of the judicial system and law enforcement could be adequately covered by the press, the committee said, without jeopardizing the rights of individual defendants. Much of the problem involves simply the *timing* of publication, and the press should be more willing to defer or delay publishing until a trial is completed.

The press, on the other hand, saw the problem as one of fulfilling its role of communicating to society *promptly* the facts about crime, law enforcement and the administration of justice. Effective exposure of corruption, malpractise or miscarriage of justice is much more difficult in an atmosphere where withholding of information is accepted--though even temporarily--as part of a system.

LACK OF FLEXIBILITY

THE MEDIA'S OBJECTION to the *Reardon Report* centered on the *lack of flexibility* the restraints put on dissemination of certain kinds of information--prior criminal records, for example. Press spokesmen argued that withholding information on prior criminal records *generally* is a good rule, but that there are exceptional circumstances that should be recognized.

Under the Reardon standards, the press maintained that the great bulk of cases would be handled more secretly: the public would never get the facts about the background of the accused, who witnessed the crime, what the police said, and so on. And the defendant, it was explained, wouldn't get a fair trial. He would only get less protective scrutiny than now from the press and public as to the caliber of justice being administered. The right to reject inquiry and maintain a posture of silence, it was argued, provides too great a potential for abuse of the extensive powers possessed by the judiciary and law enforcement.

Critics of the *Reardon Report* also cited the infrequency with which truly prejudicial, or even potentially prejudicial, situations arose. They pointed to the bulk of criminal cases that were reported as necessary to serve the public

right to information about the character of crime and criminals in their community. They conceded that infrequency should not result in indifference, but argued that the answer was to find a solution less evil than the condition being corrected.

As discussions continued, tensions seemed to ease.

By November, 1968, a law professor writing in the *Bulletin of the American Society of Newspaper Editors* commented that, while newspapermen and lawyers appeared "locked in mortal combat," after one got past the "passionate calls to battle and the inflammatory slogans, one may find the real positions of the parties are not, in fact, so very far apart."[13]

VOLUNTARY CODES

AS THE COURTS UNDERTOOK THE IMPLEMENTATION of the Reardon recommendations, media groups began generally to soften their attitude toward voluntary codes. In turn, the ABA, recognizing the limited extent to which it could directly restrain the press, relaxed its efforts to implement the Reardon standards. The ABA accepted the view that self-regulation and cooperation should be given a trial and announced as its goal the "mutual education of lawyers and media."

Voluntary codes could avoid the rigidity that had been a basic criticism of the Reardon recommendations and the media came to see guidelines and codes as preferable to closed hearings and restrictive court orders.*

Consideration of such an approach had been given considerable impetus by the *Warren Commission Report*, calling on the press for "promulgation of a code of professional conduct governing representatives of all news media" and for action on the part of state and local governments, the bar and ultimately the public to insure that appropriate action is taken "to establish ethical standards of conduct for the news media. . . . " (p. 242).

MUTUAL EDUCATION

TO ACHIEVE ITS GOAL OF "MUTUAL EDUCATION" the ABA Advisory Committee in June, 1969, issued a manual designed: (1) to clarify the types of information

**The first successful voluntary program appears to have been the product of a bench-bar-press committee appointed in February, 1964, by the Chief Justice of the Supreme Court of Washington on the unanimous recommendation of that state's Judicial Conference, consisting of judges and justices of the Washington Supreme Court and the superior courts. Later, when the Reardon Report was approved, the state's Chief Justice was quoted as saying that because of the voluntary guidelines in effect there the ABA standards would not be needed.*

that should be released promptly and those items that the courts have held to be prejudicial; and (2) to assist bar-media committees in their joint consideration of guidelines and codes.

The philosophy of both the ABA and the media groups had come around to the position that the problem could be better approached through *accommodation* rather than *absolutism*.

Increasingly both sides saw the futility of continuing friction and hostility and both began adopting a more conciliatory attitude; as discussions continued positions became less extreme. Criminal sanctions no longer seemed tenable, and at the same time use of prejudicial news was substantially curtailed by the news media.[14]

Press-bar committees of the ABA and ASNE, meeting jointly for the first time in October, 1969, laid plans for further cooperation, especially in implementation of voluntary agreements. The committees were unanimous in urging "a broad program of mutual education of lawyers, newsmen, law enforcement officials and judges."

Announcing they agreed in principle on the goals, the two parties concluded that what was most needed was "communication" and "education" among all of the involved groups. " . . . peace seems to have come in the years'-long war between American press and bar," commented *Editor and Publisher*, leading "fourth estate" trade journal. (Nov. 1, 1969, p. 11).

In March, 1970, at a conference convened by the ABA Advisory Committee and the press-bar committee of the ASNE, eight national bench, bar and media organizations adopted unanimously a statement of principles recommending establishment of joint committees. The ABA agreed to seek implementation of only that section of the *Reardon Report* dealing with its own members. It would not push other sections--those restricting statements law enforcement officers might release to the press, those dealing with closed preliminary hearings, and those providing contempt citations for reporters wilfully influencing trials. In turn, the media agreed to exert efforts to bring about more voluntary codes.

GUIDELINE WORKABILITY

IN 1972 THE FREEDOM OF INFORMATION COMMITTEE of the Associated Press Managing Editors conducted a survey to determine the workability of the voluntary agreements then in effect in various states. A large majority of editors, lawyers and judges who participated in the study said the codes or guidelines had been successful.

Editors in twenty of twenty-three states regarded the agreements as "quite successful" or "having a degree of success, without any loss in freedom of the press."

Approval of the agreements also was shared by members of the legal profession. In eighteen of nineteen states from which replies were received from judges and lawyers, the majority believed that guidelines had improved the coverage of arrests and trials while protecting the rights of both the accused and the public. They did not regard any violations of the voluntary agreements as having been of such magnitude as to destroy the effectiveness of the effort.[15]

THE CALIFORNIA RESPONSE

MEANWHILE IN CALIFORNIA--within a few days after the ABA adoption of the *Reardon Report* in February, 1968--State Bar of California President John H. Finger issued a statement agreeing to withhold action on the *Reardon Report* pending exploration of alternative ways of seeking an accommodation. He made this statement in response to inquiries from the news media. "The State Bar has regarded the problem as important," he said, "but has not regarded it as one of urgency." It should be made clear in the meantime, Mr. Finger explained, that the State Bar is a constitutional agency of the State of California and "is in no way bound by any action or recommendation of the American Bar Association which is a voluntary organization."

The same month, a former president of the State Bar, John A. Sutro, Sr., informed the state convention of the California Newspaper Publishers Association that the State Bar was reluctant to adopt the Reardon rules, restricting the relations between an attorney and the media, and expressed hope that a better method could be worked out.

The California Freedom of Information Committee promptly commended the Bar for its decision to continue independent studies and proposed a series of meetings between its committee and the bar association "to further an understanding of mutual problems." Toward that goal the State Bar appointed a Committee to Confer with the Media, under the chairmanship of J. Hart Clinton, both a newspaper publisher and member of the State Bar. Joint negotiations were begun in July, 1968.

The Freedom of Information Committee represented the state's working press and included members of Sigma Delta Chi, the professional journalism society; the California Newspaper Publishers Association; the California Broadcasters Association; the Radio and Television News Directors Association; and other interested groups and individuals. Joining in the discussions were a committee of the Conference of California Judges and, as an observer, a special committee of the Judicial Council of California.

First chairman of the FoI Committee was Larry Sisk, managing editor of the *San Diego Union-Tribune*, who initiated bench-bar-media discussions. He was succeeded by Dick Fogel of the *Oakland Tribune*, who served as chairman during much of the negotiating period. Fogel was succeeded by Raymond Spangler, retired publisher of the *Redwood City Tribune* and former national president of Sigma Delta Chi (now the Society of Professional Journalists, SDX).

THE JOINT DECLARATION

IN NOVEMBER, 1969, A DRAFT of a *Joint Declaration Regarding News Coverage of Criminal Proceedings in California* was agreed upon. It was later amended and approved January 16, 1970 for submission to bench, bar and media organizations--an effort representing some twenty months of negotiations. By February 15, 1970, the statement had been approved by six bench-bar-media organizations.[16]

The Judicial Council, rulemaking body of the California court system, in May, 1970 gave the *Joint Declaration* "official recognition" by amending court administrative rules and calling on presiding judges of superior and municipal courts to meet when appropriate with committees of the bar and news media "to promote understanding of the principles of fair trial and free press."[17]

In developing the California *Joint Declaration* negotiators made an early determination that no enforcement or disciplinary procedure would be provided. Many editors had indicated they would withdraw from participation of consideration of any "code" that incorporated enforced compliance on the ground that an editor had to retain discretionary judgment over what to print, and further that such codes did not constitute restrictions on the bench or bar. The media thus had no corresponding sanction in event of breaches of the First Amendment--for example, "unnecessary" or "unreasonable" protective orders and similar restrictions.

The FoI Committee, in promulgating the *Joint Declaration* to the working press in August, 1970, described the document as follows:

> *Nobody claims it is ideal. However, it is voluntary and is not irrevocable. It leaves decisions about what to publish or broadcast to individual editors. It does not proscribe the release of information but suggests careful consideration as to the impact of publishing or broadcasting particular facts.*
>
> *It endorses application of sound and sensible journalistic practices and it enumerates some categories of factual information which would not be likely to prejudice a trial.*

The *Joint Declaration* incorporates nine specific guiding principles. One of the most important is Paragraph 9 calling for the establishment of bench-bar-media committees, aided when appropriate by representatives of law enforcement agencies and other interested parties, "to meet from time to time to review problems and to promote understanding of the principles of fair trial and free press." In furtherance of Paragraph 9, a two-day bench-bar-media conference was held at Berkeley in May, 1973, co-sponsored by the Conference of California Judges, the California Newspaper Publishers Association, the California Freedom of Information Committee and the U.C. School of Journalism.*

**Copies of the transcript of this two-day conference on "The Law, the Courts and the News Media" are available from Project Benchmark, 2150 Shattuck Avenue, Room 817, Berkeley, California 94704.*

STATEWIDE COMMITTEE

THE STATEWIDE BENCH-BAR-MEDIA COMMITTEE meets annually to hear reports from county joint committees and to discuss mutual problems. At the February, 1973 meeting, an Executive Committee, composed of representatives of endorsing organizations listed in the *Joint Declaration*, was authorized to hold interim sessions.

Many editors have been highly skeptical about the value of such guidelines--some still are. Tough, realistic problems are involved.

One appellate judge has described sensational cases--such as *Corona*--as demonstrating the "impotence of ethical codes or standards promulgated by representatives of the bar and press."

In ordering a change of venue in the *Corona* case, Justice Friedman commented:

When a newsworthy crime story breaks, these high-minded declarations fall flat before the competitive onslaughts of resourceful newsmen, bent on producing profitable merchandise wrapped in the gilt of constitutional freedoms. The social values of media crime reporting are real and undeniable. So are the social disadvantages. Pre-arrest and post-trial publicity produce maximum advantage and minimal disadvantage. The pinch occurs during the period between the suspect's arrest and the time of the verdict. At this critical stage of the judicial process, no realistic accommodation of competing values can be attained without unwrapping the constitutional pretensions which enfold the media's profit motivations.[18]

FORMING LOCAL COMMITTEES

IN THOSE COUNTIES WHERE LOCAL COMMITTEES have not yet been organized, the statewide group has suggested the following procedures for interested parties:

You can help see that qualified individuals in each county get together to discuss any local problems which arise. Whenever possible groups should include, along with the judges, authorized representatives of the county bar, the CNPA, CBA, Sigma Delta Chi, California Freedom of Information Committee and, when pertinent, one or both wire services.

Media representatives are to be designated by the president of CNPA, chairman of CBA, appropriate chapter president of Sigma Delta Chi, California Freedom of Information Committee chairman and wire service bureau chiefs. Local publishers, editors, station managers and news directors are to be included.

Both sides of the table should be well represented so that the subject can be thoroughly explored and effectively evaluated. The object is review and interpretation in the light of the Joint Declaration with a mind to better understanding and possible reconciliation of differences. Members of the state level committee will be available to confer on given problems if needed. On some occasions difficulties may be anticipated and resolved in advance. If any problems should remain unresolved they may be forwarded

to the state level committee for further study.

As of early 1974, committees were active in nine counties--Los Angeles, Marin, Orange, Riverside, San Mateo, San Bernardino, Santa Clara, San Diego and San Francisco--and steps were under way to organize such a group in Alameda County.

These local committees provide opportunities for interested individuals and agencies to engage informally in discussion of free press-fair trial problems. They provide a useful forum for further dissemination among the bench, bar and news media of the principles of the *Joint Declaration*--a continuing goal of the FoI Committee and Project Benchmark, the public information and education program of the Conference of California Judges.

PROTECTIVE ORDERS

PRETRIAL PUBLICITY USUALLY IS SEEN as the principal free press-fair trial problem, but publicity *during a trial* also can present troublesome situations. In a lengthy, drawn-out case involving a sensational crime, problems often can center around the publication of statements that have been excluded from the trial under rules of evidence.

Issues such as whether evidence was illegally obtained or whether a confession was voluntarily made are for determination by the trial judge out of the presence of the jury. Such arguments, though made out of their presence, conceivably could reach jurors through the news media.

In addition to the "filtering" remedies enumerated earlier, courts have recently employed, with increasing frequency, two additional "tools"--exclusion of the public and press from certain judicial proceedings and "restrictive" orders.

On the terminology of such orders, Justice Otto M. Kaus has commented:

> *Orders of the kind under consideration are sometimes referred to as 'gag orders' or 'publicity orders.' The first term is perjorative, the latter perhaps too restrictive. We therefore accept the suggestion of one of the amici curiae who have filed briefs in this matter, and refer to such orders as 'protective orders.' We realize that those who oppose such orders on principle may find this designation too benign. At least, however, it correctly describes their purpose.*[19]

COURTS' JUSTIFICATION

PROTECTIVE ORDERS HAVE BEEN JUSTIFIED on the ground they sometimes are necessary to preserve a defendant's right to a trial by a jury representing a fair cross-section of the community where the trial occurred.[20]

Trial courts have been held to have the power to issue orders to protect a defendant's right to a fair trial. The legal basis stems from *dicta* by the U.S. Supreme Court in *Sheppard v. Maxwell* and later from *dicta* in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In the latter decisions the Court, in the ruling on the constitutional aspects of a newsman's refusal to testify before a grand jury, commented: "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure a defendant a fair trial."

Legal authorities have disagreed as to whether this was a casual dictum or a mandate to lower courts. Justice Kaus, in *Younger v. Smith*, described it as a "puzzler." He wrote:

> *It would be presumptuous of us to suggest that it does not follow from anything which that court said, held or intimated in Sheppard. Whether it is an indication of what the constitutional future holds for us or whether it will be relegated to the status of an inadvertent dictum dropped in the course of a very long opinion, we do not know.* [30 C.A.3d at 155, 156].

The legal basis for protective orders has been upheld in at least two California decisions--*Younger v. Smith* and *Hamilton v. Municipal Court*, 270 C.A.2d 797 (1969). The question of whether publicity might affect the prospective jurors has produced a judicial assumption to that effect in the California Supreme Court.[21] And this conclusion also was advanced in the *Reardon Report*. (p. 35).

Individual protective orders in specific cases were said to have "mushroomed" in California beginning in 1969 following the dramatic issuance of the trial judge's "Order re Publicity" in the case of *People v. Sirhan Bishara Sirhan*.[22] Evelle J. Younger, then District Attorney of Los Angeles County, sought a writ prohibiting enforcement of the order, but his petition was summarily denied by the California courts, and the U.S. Supreme Court denied a writ of certiorari. [393 U.S. 1001].

TWO FORMS: DIRECT, INDIRECT

SUCH ORDERS CAN BE CLASSIFIED IN TWO FORMS:

a) those indirectly restricting the news media by putting restraints on lawyers, law enforcement officers and other news sources; and

b) those directly restricting the media--a form of prior restraint.

Briefly, California courts have held:

1. A protective order may issue against the prosecutor, public officials and witnesses where the evidence presented shows a *reasonable likelihood* that in the absence of such an order prejudicial publicity will be published.

2. To justify exercise of this judicial power, a factual basis, depending on the *necessities of the moment*, must be shown.

3. In protective orders issued against either a defendant or the mass media a different test must be applied and such an order may be issued only upon showing of a *clear and present danger* that without such an order the defendant would be denied right to a fair trial.[23]

4. A protective order may be issued by the court *sua sponte*--on its own motion--whenever the court becomes aware of prejudicial publicity that justifies issuance of an order to guarantee the defendant a fair trial.

ORDERS AGAINST MEDIA

THE CALIFORNIA APPELLATE COURTS--principally in *Younger v. Smith* (2nd district) and *Sun Company v. Superior Court* (4th district)--have provided guidelines that appear to set forth minimal factors to be considered by a trial judge to justify a protective order directed against the media.

1. The trial judge must have already taken steps to silence the prosecution, public officials and witnesses or any other persons subject to judicial process from making public statements and found that such restraints have been ineffective to curb prejudicial publicity in the news media.

2. The evidence presented in support of the order must demonstrate that the crime will continue to be newsworthy and that the degree of imminent threat to a fair trial is "extremely high." The danger must not be remote or even probable. It must immediately imperil the right to a fair trial.

3. The evidence presented must show that the tone of the news media publicity has been not only "prejudicial" but also "hostile" to the defendant.

4. The evidence must show that the publicity has not been restricted to news media whose circulation covers a relatively small portion of the county where the crime occurred.

5. The trial court must first consider whether the other legal safeguards to a fair trial will afford sufficient protection for the accused, i.e., change of venue, the right to challenge biased jurors, jury sequestration, mistrial, new trial, appeal and writ of habeas corpus.*

**The writer is indebted to Judge Arthur L. Alarcon of the Superior Court of Los Angeles County for the preceding analysis, prepared for a Superior Court Seminar on "Protective Orders" held by the Conference of California Judges in Monterey in May, 1973.*

DIRECT MEDIA RESTRAINT LIMITED

WHILE THE *SHEPPARD* DECISION HAS BEEN UTILIZED as a broad sanction for trial courts to prohibit court personnel, attorneys and law enforcement agents from disseminating information to the press during pretrial proceedings, whenever contempt sanctions have been sought directly against the press, or upon one not immediately subject to judicial supervision, the Supreme Court has consistently and severely limited the judicial contempt power. In a series of cases beginning with *Bridges v. California* in 1941 [314 U.S. 252], the Court has held that speech or published material could not be prohibited unless there was a "clear and present danger" to the administration of justice. The substantive evil or danger must be extremely serious and the degree of imminence extremely high.

The principal California case in which the court attempted to impose a protective order directly on the news media grew out of a shotgun slaying of a 4-year-old girl in Los Angeles County, a "joy killing," according to media descriptions. The trial judge in *Younger v. Smith* issued an order directed not only at persons connected with the prosecution and the defense but also at all agencies of the public media" so that they would "refrain from the publication of any matters . . . except as occur in open court." [30 C.A.3d at 148].

The appellate court held such direct restraint against the media impermissible, in that neither the defendant nor the lower court had carried the "heavy burden of showing justification for the imposition" of a prior restraint.

Although recognizing that the trial judge was "closer to the situation than we are" and that "it is difficult to put between the covers of the record . . . all of the many factors, some perhaps subconsciously assimilated" that led to the trial judge issuing an order controlling future publicity, the appellate court still regarded itself as having a "constitutional duty . . . to make an independent assessment of the facts." [30 C.A.3d at 154].

As to the right of the *People* to move for a protective order, the court in the *Sun Company* case commented: " . . . it seems implicit in any concept of due process that society is entitled to a fair trial for the redress of wrongs against it and that the victim of a criminal wrong is certainly entitled to the same right." [29 C.A.3d at 822].

Protective orders, a California appellate court has commented, must be "fashioned to the necessities of the moment," and neither the situation that may have justified an order nor the order itself is "static." [*Younger v. Smith*, *supra*, at 158]. Hence, such orders should be readily reviewable and subject to modification. Justice Kaus explained:

> *If it appears that in making its initial order the court reached for a shotgun to kill what has turned out to be a gnat, or that particular provisions of the order are unnecessary or disproportionately irksome, the order is always subject to summary modification, even on the court's own initiative.* [30 C.A.3d at 159].

CLOSED TRIALS

BOTH THE FEDERAL AND CALIFORNIA CONSTITUTIONS guarantee the accused in a criminal case the right to a speedy and public trial. The question occasionally arises as to whether the accused can waive this right and whether he is entitled to a "closed" trial.

The Bill of Rights was designed to protect the individual against governmental interference and does not include language guaranteeing a fair trial to the *public*. The state jurisdictions have been divided, California taking a more or less intermediate position.

In *Kiratowsky v. Superior Court*, the defendant in a murder trial waived her right to public proceedings on the grounds she was not otherwise able to testify as to abnormal sex practises suffered at the hands of the victim. The trial court excluded the public and the press. On application for a writ of mandate the Court of Appeal held that the trial judge "went too far" in excluding the public throughout the *entire* trial. Conceding that the defendant's right to a fair trial is paramount to the statutory right of the public to attend trials, the appeals court apparently placed the burden on the defendant to prove that testimony should be excepted from the general statutory rule. The opinion needs to be read narrowly; the court held only that the defendant's specific testimony fell within the exception. [143 C.A.2d 745 (1956)].

Dickinson v. United States, one of the most highly controversial cases in the free press-fair trial arena, arose more recently when two Louisiana newsmen were held in contempt for violating a protective order barring all reporting of a Federal civil rights hearing which the general public and the press were allowed to attend. [465 F.2d 496 (1972)].

With admitted knowledge that their actions violated the restrictive order, the newsmen wrote articles summarizing in detail the testimony presented at the hearing. Each was found guilty of criminal contempt and fined $300.

The appellate court held that a "blanket ban on publication of Court proceedings so far transgresses First Amendment freedoms that any such absolute proscription 'cannot withstand the mildest breeze emanating from the Constitution.'"

The *Dickinson* decision has been sharply criticized by the news media. For example, the general counsel for the *New York Times* has described the case as a "very dangerous precedent."[24]

There has been speculation that the U.S. Supreme Court, in denying a writ of certiorari, may have been reluctant to decide on whether reporters are "above the law," i.e., entitled to disobey an invalid gag order, at a time when critics of the President were contending that he was required either to obey a court order to produce the Watergate tapes or appeal.[25]

"Invalidity," the Court said, "is no defense to criminal contempt. . . . Court orders have to be obeyed until they are reversed or set aside in an orderly

fashion."

The Court concluded:

> *Having disobeyed the Court's decree they [the reporters] must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law. They may take comfort in the fact that they, as their many forerunners, have thus established an important constitutional principle--which may be all that was really at stake--but they may not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court.*

The case established the principle that any judicial prohibition of the right of the press to publish accurate reports of proceedings that transpired in open court probably was unconstitutional--but went on to hold that courts could punish (as contempt) violations of even constitutionally defective orders infringing freedom of the press.

The case was appealed to the U.S. Supreme Court, which denied certiorari. [42 LW 3247].

CALIFORNIA PROCEDURE

IT APPEARS THAT IN CALIFORNIA, A REPORTER seeking to modify a protective order could do so without violating the order by means of a writ of mandate (to vacate the order) rather than risk a contempt conviction and a later affirmance by a reviewing court. A person accused of violating the provisions of a protective order may attempt to demonstrate to the court that the order was not lawfully issued because of failure to meet the burden of proof necessary to justify the issuance of such an order. A person found guilty of contempt for violation of a protective order may seek appellate review on the ground there was lack of evidence to show necessity or justification of a protective order or that the publication, while in violation of the protective order, was not prejudicial.[26] Hence, it would appear that the anomalous situation found in *Dickinson* would not prevail in California.

Because of the serious constitutional question involved and the heavy burden of proof required to justify *prior restraint* on the press, Judge Alarcon has recommended that a court should not consider a request for a protective order without serving notice that such an order has been requested upon representatives of each of the news media sought to be restrained by such an order, and that the court permit counsel for the news media to present evidence and argue in opposition to the issuance of a protective order.

RARITY OF SITUATION

WHEN ONE REFERS TO FREE PRESS-FAIR TRIAL PROBLEMS, he is almost always referring to the sensational cases. These cases are most likely to produce "protective orders" and the problem, of course, is to insure that only those restrictions are imposed that are fully justified as furthering the fair administration of justice.

Although an increase in First-Sixth Amendment conflicts at one time seemed apparent, the reality is that such cases are quite rare. For example, in Los Angeles County during the past five years there have been some 200,000 criminal felony filings, more than 10,000 criminal felony trials and more than a million misdemeanor filings--but only ten trials, including Sirhan and Manson--in which free press-fair trial issues have been involved.[27]

Critics of "protective" orders maintain that most of the restraints are unrealistic and unnecessary. In celebrated cases, studies have shown, the first round of publicity usually occurs at the time of the crime and initial arrest. This is the point at which police speculation and other potentially prejudicial statements are most likely to occur. In nearly all cases the next round of publicity, if any appears at all, will be at the time of trial, and news stories at this time are primarily devoted to coverage of open court proceedings.

It seems unlikely that a juror will be influenced by stories published about a crime and arrest several months before the date of the trial and selection of the jury. Only where there has been sustained and inflammatory publicity does such a problem arise.

The problem becomes most acute when the protective order restricts media publication of proceedings that took place in open court.

The Supreme Court repeatedly has reaffirmed that:

> *A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.*[28]

Moreover, " . . . reporters of all media . . . are plainly free to report whatever occurs in open court through their respective media."[29]

"GAG" ORDERS QUESTIONED

PRESS SPOKESMEN HAVE QUESTIONED THE PREMISE that "gag" orders are necessary to the fairness of trials. Considering the alternatives available, they maintain, a trial judge should be able to protect the integrity of a trial without such restrictive actions, which violate the free speech rights of those against

whom they are directed.

Part of the problem is that a judge may suddenly encounter a sensational case, one that has attracted unusual local attention because of its bizarre nature. It may be the judge's first experience in handling such a case, even though he is experienced on the bench. In all, there are some 1,100 trial court judges in California. So it is not surprising that a judge--new or experienced--might face for him an unprecedented situation in a celebrated, publicity-generating case.

In a sensational, long drawn-out, and thus expensive trial, a judge understandably, and no doubt instinctively, leans toward a protective order. He sees his primary goal as insuring a fair trial, and refusals by the bench to grant a protective order have resulted in appellate decisions granting new trials.

It is the sensational case, particularly in a small residential community, in which the possibility of an unfair trial conceivably arises--when the jury panel "has been bathed in streams of circumstantial incrimination flowing from the news media," as the appellate court said in ordering change of venue in the *Corona* case. [24 C.A.3d 872 at 878].

Justice Friedman, in *Corona*, cited some of the kinds of incriminatory statements that might be regarded as prejudicial:

> *The prosecution may never offer the "evidence" served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial as a matter of law. It may be hearsay. It may have come to light as the product of an unconstitutional search and seizure. If it is ultimately admitted at the trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal.* [24 C.A.3d at 878].

The appellate court in the *Sun Company* case provided a useful analysis for the rationale underlying protective orders. That case involved an "Order re Publicity" prohibiting the press from publishing the names and photographs of several witnesses called by the State in a murder trial. Two Chino prison inmates were charged with stabbing another prisoner to death. The order was based on the grounds that publication of the names or photographs of prisoners called as witnesses could pose a serious threat to their lives and well-being, and that if they refused to testify the State would be denied an opportunity for a fair trial. If the inmates declined to testify, any judicial sanctions, such as contempt, were described as "merely 'token' punishment" in view of the time still to be served.

In setting aside the superior court's Order re Publicity, Justice John W. Kerrigan set down the following guidelines:

> *. . . a prior restraint on publication in the name of a fair trial should rarely be employed against the communications media for the following*

cogent reasons:

> *(1) . . . the vast majority of criminal actions (such as the one under review) excite little, if any, public interest and receive minimum coverage. Ordinarily, it is only the most unusual criminal matter--the outrageous offense or one involving a prominent victim or an infamous defendant--that generates public attention; and*
>
> *(2) even in the infrequent notorious case, a prior restraint on publication should be considered only upon presentation of strong proof that the publication sought to be restrained meets the clear-and-present danger standard.* [105 Cal. Rptr. at 877].

These reservations combined with the standards suggested by Judge Alarcon should, if adhered to by trial judges, eliminate the kind of restrictive orders that the press in the past has criticized as routine and unnecessary.[30]

SUMMARY

THE BENCH-BAR-MEDIA PROFESSIONS have achieved considerable progress in the past few years in attempting to resolve the free press-fair trial dilemma. There has been more mutual communication and understanding, less hostility and friction. Conferences and productive discussions have replaced self-serving cliches and epithets.

The kind of tension represented by the observation of one commentator in 1964 has been greatly reduced. "Nothing has contributed more to the free press-fair trial stalemate than newsmen who view the problem only in terms of oppressive courts, and lawyers who see the conflict only in the context of a licentious press," wrote Professor Donald M. Gillmor.[31]

The bench, bar and news media have in recent years devoted a great amount of attention to the delicate balancing required if both the First and Sixth Amendments are to have their full force.

The literature devoted to the problem has been voluminous, but as a Federal appellate judge recently observed, "the Day of Armageddon has not yet dawned on this great conflict."[32]

In the extensive discussion and study that has taken place, one solution prevails--usually put in terms of accommodation or dialogue. This, of course, is a never-ending process, and one that requires persistent and continuous effort in an atmosphere of goodwill and understanding.

The late Dr. Chilton R. Bush, one of the nation's most respected journalism educators, wrote:

> *Some problems cannot be solved by scientific method because scientific method can solve only those problems about which there is agreement as to*

the relevant social ends. Problems which involve a conflict of social ends can be solved by reflection. . . .
The newsroom near edition time is not always an adequate environment for reflection, but seminars and review sessions will develop a way of thinking that can be applied in particular situations in the future.[33]

A wide range of comments recommending discussion and exchange is available, both from experienced jurists and others who have studied the problem. For example, Justice Bernard S. Meyer, a member of the Reardon Committee and former New York Supreme Court justice, wrote: "Cooperation between the bench and media, when each understands the responsibilities of the other, can provide a more complete answer to the problems of potentially prejudicial publicity than can orders or regulations."[34]

A committee appointed to study the relationship of the courts and news media in the District of Columbia concluded that "one of the root causes of communication difficulties . . . is a lack of trust and understanding on both sides" and called for a committee "to arrange and sponsor a series of events designed to foster greater dialogue and understanding between newsmen and those involved in the judicial system."[35]

The California Freedom of Information Committee, in implementing the *Joint Declaration* in August, 1970, explained: "This document is aimed at effecting a fully reasoned accommodation between the press and the judicial system in their concommitant efforts to serve our society."

The benefits of county bench-bar-media committees and other forms of continued dialogue appear fairly obvious, although documentation is not readily available. In addition to the county groups formed to help implement the *Joint Declaration*, other forms of cooperative effort can produce worthwhile benefits. Bar associations and the judiciary can join with local press clubs in seminars and informal meetings. Many reporters assigned to cover crime and/or the courts have received little or no structured or professional education about the law. Representatives of the bench and bar can be helpful, both on an individual and group basis.

In a textbook prepared for a National College of the State Judiciary course, Judge Donald R. Fretz of the Superior Court of Merced County, has outlined ways in which the bench can aid newsmen:

(1) *personal relationship;*

(2) *indoctrination (help newsmen understand the court and procedures, the judge and his role);*

(3) *communicating judicial rulings (keep press deadlines in mind);*

(4) *public information officer (possible employment by large courts of an officer to communicate decisions and other kinds of information); and*

(5) *adequate physical facilities.*[36]

The Conference of California Judges, through its Public Information Committee and Project Benchmark, has undertaken a program aimed at increased understanding of the judicial process and at assisting judges in achieving better public notice of mutual problems in the administration of justice. An educated public would seem one of the best means of advancing better understanding and of promoting the mutual goals of the three institutions--bench, bar and media.

The three are in basic agreement on the fundamental considerations: equal, fair justice and a free press. All agree that a free press is one of society's principal guarantors of fair trials and that fair trials constitute a major protection of the press's freedom.

The press has often been termed a "fourth estate," serving in many respects as a coordinate branch in a democratic society. This involves an almost constitutional "watchdog" role, and any restraints--directly or indirectly--should in no way diminish this function. If there is to be proper scrutiny of the administration of justice, the best way is through publicity.

One of the subtle--but persuasive--arguments against "fair trial" restraints on the press is that if official sanction is used in this area, it helps create an atmosphere that makes it easier to impose controls in other areas--threatening, in the end, to curtail the "uninhibited, robust and wide-open" debate on public issues that underlays our system of democratic government.[37]

The challenge is to reconcile, on the one hand, the legitimate right of the public to know what is happening with, on the other, the right of the accused to a trial by impartial jurors--a task that hopefully can be accomplished by reasonable, mutually adopted guidelines.

Improved and continuous communication among the professions of bench, bar and media is essential.

The California *Joint Declaration* was approved in February, 1970, and is now in its fifth year. Some of the county joint committees were formed not long after the adoption and, through a continuing "talk it over" approach, much has been accomplished. Much more remains to be done.

The *Joint Declaration* is an attempt to achieve what Chief Justice Donald R. Wright described as the "healthy working relationship between the courts and press [that] is essential for the continued vitality of our system of justice." He summarized the problem:

> *Without a positive relationship of mutual understanding neither the press nor the courts can maximize their contribution to the society in which we live. Our entire democratic process depends upon our preserving both a strong and free press, and without a responsible, free press we would be unable to maintain a strong and free press and an independent judiciary. Without the courts there would be no free press, and without a responsible, free press we would be unable to maintain a strong and effective judicial system.*[38]

FOOTNOTES

[1]Powell, "The Right to a Fair Trial," 51 *American Bar Association Journal* 534, 535 (1965).

[2]Wright, "Fair Trial and Free Press: Practical Ways to Have Both," 54 *Judicature* 377, 380 (1971).

[3]*Report of the President's Commission on the Assassination of President Kennedy* 20 (1964).

[4]American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* (Dec., 1966), p. 23. [Hereafter cited as *Reardon Report.*]

[5]Louis B. Seltzer, *The Years Were Good* (1965), pp. 265-277.

[6]*People v. Tidwell*, 3 C.3d 70 (1970).

[7]30 F.R. 5510 (Apr. 17, 1965).

[8]36 F.R.2 1028 (Nov. 3, 1971); 28 C.F.R., sec. 50.2.

[9]American Newspaper Publishers Association, *Free Press and Fair Trial* (1967), p. 1.

[10]Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York, *Radio, Television and the Administration of Justice* (1967).

[11]45 F.R.D. 391 (1968).

[12]45 F.R.D. 391; 52 F.R.D. 135.

[13]116 *Pa. L. Rev.* 1118 (1968), quoted in Louis B. Schwartz, "The Other Side," *Bulletin of the American Society of Newspaper Editors*, No. 524 (Nov., 1968), p. 7.

[14]J. Edward Gerald, "Press-Bar Relationships," 47 *Journalism Quarterly* 223, 232 (1970).

[15]Hu Blonk, *Editor and Publisher*, Jan. 20, 1973, p. 11; see also transcript of proceedings for "The Law, the Courts and the News Media," *Los Angeles Daily Journal*, Feb. 13, 1974, p. 65.

[16]*Joint Declaration Regarding News Coverage of Criminal Proceedings in California*, State Bar of California (1970).

[17]*Ibid.*, p. 4.

[18]*Corona v. Superior Court*, 24 C.A.3d 872, 878, 879, fn. 5 (1972).

[19]*Younger v. Smith*, 30 C.A.3d 138, 143 (1973).

[20]*Younger v. Smith*, *supra*; *People v. Powell*, 87 C. 348, 354, 360 (1891).

[21]*People v. Lambright*, 61 C.2d 482 (1964).

[22]Warren and Abell, "Free Press-Fair Trial: The 'Gag Order,' a California Aberration," 45 *So. Cal. L. R.* 51, 61 (1972).

[23]*Hamilton v. Municipal Court*, 270 C.A.2d 797 (1969), in the case of the defendant; *Sun Company of San Bernardino v. Superior Court*, 29 C.A.3d 815 (1973), in the case of the news media.

[24]James C. Goodale, "The Press 'Gag' Order Epidemic," 12 *Columbia Journalism Review* 49, 50 (1973); see also transcript of proceedings for "The Law, the Courts and the News Media," *Los Angeles Daily Journal*, Feb. 13, 1974.

[25]Reporters Committee for Freedom of the Press, *Press Censorship Newsletter*, No. III (Nov.-Dec., 1973), p. 4.

[26]*Younger v. Smith*, *supra*, 150.

[27]Data from Sam Gordon, Assistant Executive Officer, Los Angeles Superior Court, Aug. 29, 1973.

[28]*Craig v. Harney*, 331 U.S. 367, 374 (1946).

[29]*Estes v. Texas*, 381 U.S. 532, 541, 542 (1965).

[30]Warren and Abell, *op. cit.*

[31]Donald M. Gillmor, "Free Press versus Fair Trial: A New Era?" 41 *Journalism Quarterly* 27, 36 (1964).

[32]*U.S. v. Dickinson*, 465 F.2d 496 (1972).

[33]Chilton R. Bush, *Newswriting and Reporting Public Affairs* (2nd ed.; 1970), pp. 395, 396.

[34]Bernard M. Meyer, *State Trial Judges' Book* (2nd ed.; 1969), p. 260.

[35]District of Columbia Bar Association, Young Lawyers Section, *Some Suggestions for Bridging the Gap* (1972), p. 24.

[36]Donald M. Fretz, *Courts and the Community* (1973), pp. 13-16.

[37]*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[38]Wright, *op. cit.*, 377.

Joint Declaration Regarding News Coverage of Criminal Proceedings in California

STATEMENT OF PRINCIPLES

The bench, bar, and news media of California recognize that freedom of the press and the right to fair trial, as guaranteed by the First and Sixth Amendments to the Constitution of the United States, sometimes appear to be in conflict. They believe, however, that if the principles of fair trial and free press are applied responsibly in accord with high professional ethics, our society can have fair trials without limiting freedom of the press.

Accordingly, the following principles are recommended to all members of the bar and the press in California.

1. The news media have the right and responsibility to gather and disseminate the news, so that the public will be informed. Free and responsible news media enhance the administration of justice. Members of the bench, the bar, and the news media should cooperate, consistent with their respective ethical principles, in accomplishing the foregoing.

2. All parties to litigation, including the state, have the right to have their causes tried fairly by impartial tribunals. Defendants in criminal cases are guaranteed this right by the Constitutions of the United States and the State of California.

3. Lawyers and journalists share with the court responsibility for maintaining an atmosphere conducive to fair trial.

4. The news media and the bar recognize the responsibility of the judge to preserve order in court and to conduct proceedings in such a manner as will serve the ends of justice.

5. Editors in deciding what news to publish should remember that:

(a) *An accused person is presumed innocent until proved guilty.*

(b) *Readers, listeners, and viewers are potential jurors or witnesses.*

(c) *No person's reputation should be injured needlessly.*

6. No lawyer should use publicity to promote his version of a pending case The public prosecutor should not take unfair advantage of his position as an important source of news. These cautions shall not be construed to limit a lawyer's making available information to which the public is entitled. Editors should be cautious about publishing information received from lawyers who seek to try their cases in the press.

7. The public is entitled to know how justice is being administered, and it is the responsibility of the press to give the public the necessary information. A properly conducted trial maintains the confidence of the community as to the honesty of its institutions, the competence of its public officers, the impartiality of its judges, and the capacity of its criminal law to do justice.

8. Journalistic and legal training should include instruction in the meaning of constitutional rights to a fair trial, freedom of the press, and the role of both journalist and lawyer in guarding these rights.

9. A committee of representatives of the bar, the bench, and the news media, aided when appropriate by representatives of law enforcement agencies and other interested parties, should meet from time to time to review problems and to promote understanding of the principles of fair trial and free press. Its purpose may include giving advisory opinions concerning the interpretations and application of these principles.

These principles have been endorsed, as of February 15, 1970, by the following: The State Bar of California, California Freedom of Information Committee, California Newspaper Publishers Association, California Broadcasters Association, Radio and TV News Directors, and the Executive Board of the Conference of California Judges.

STATEMENT OF POLICY

To give concrete expression to these principles in newsmen's language the following statement of policy is recommended for voluntary adoption by California newspapers and news broadcasters.

Our objective is to report the news and at the same time cooperate with the courts to assure the accused a fair trial.

Protection of the rights of an accused person or a suspect does not require restraint in publication or broadcast of the following information:

—His or her name, address, age, residence, employment, marital status, and similar background information.

—*The substance or text of the charge, such as complaint, indictment, information and, where appropriate, the identity of the complainant.*

—*The identity of the investigating and arresting agency, and the length of investigation where appropriate.*

—*The circumstances surrounding an arrest, including the time and place, resistance, pursuit, possession and use of weapons, and a description of items seized.*

Accuracy, good conscience, and an informed approach can provide nonprejudicial reporting of crime news. We commend to our fellow newsmen the following:

Avoid deliberate editorialization, even when a crime seems solved beyond reasonable doubt. Save the characterizations of the accused until the trial ends and guilt or innocence is determined.

Avoid editorialization by observing these rules:

—*Don't call a person brought in for questioning a suspect.*

—*Don't call a slaying a murder until there's a formal charge.*

—*Don't say solution when it's just a police accusation or theory.*

—*Don't let prosecutors, police or defense attorneys use us as a sounding board for public opinion or personal publicity.*

Exercise care in regard to publication or broadcast of purported confessions. An accused person may repudiate and thereby invalidate a confession, claiming undue pressure, lack of counsel, or some other interference with his rights. The confession then may not be presented as evidence and yet have been read by the jurors, raising the question whether they can separate the confession from evidence presented in court. If you do use a "confession" call it a statement and let the jury decide whether the accused really confessed.

In some circumstances, as when a previous offense is not linked in a pattern with the case in question, the press should not publish or broadcast the previous criminal record of a person accused of a felony. Terms like "a long record" should generally be avoided. There are, however, other circumstances—as when parole is violated—in which reference to a previous conviction is in the public interest.

Records of convictions and prior criminal charges which are matters of public record are available to the news media through police agencies or court clerks. Law enforcement agencies should make such information available to the news media upon appropriate inquiry. The public disclosure of this information by the news media could be prejudicial without any significant contribution toward meeting the public need to be informed. The publication or broadcast of such information should be carefully considered.

In summary:

This Statement of Policy is not all-inclusive; it does not purport to cover every subject on which a question may arise with respect to whether particular information should be published or broadcast. Our objective is to report the news and at the same time cooperate with the courts to help assure the accused a fair trial. Caution should therefore be exercised in publishing or broadcasting information which might result in denial of a fair trial.

Judicial Council Action

[The Judicial Council at its May 1970 meeting approved the following recommendations:

[(1) That when appropriate the Chairman of the Judicial Council designate representatives to participate in joint committees, such as those contemplated by paragraph 9 of the Statement of Principles, "to review problems and to promote understanding of the principles of fair trial and free press."

[(2) In order to give recognition to the Joint Declaration, and to bring it to the attention of the judiciary, the Judicial Council added to the "Standards for Judicial Administration, Section 2, Duties of Presiding Judge," the following new subsection, effective July 1, 1970:

[Sec. 2. *Duties of presiding judge*

[In superior and municipal courts the presiding judge should: . . .

[(p) when appropriate, meet with or designate a judge or judges to meet with any committee of the bench, bar and news media to review problems and to promote understanding of the principles of fair trial and free press, under paragraph 9 of the "Joint Declaration Regarding News Coverage of Criminal Proceedings in California," as approved for submission on January 16, 1970, and adopted by the State Bar of California and the California Freedom of Information Committee.]

Newsmen's Shield Laws

THE UNITED STATES SUPREME COURT, in a 5-to-4 decision in the summer of 1972, held that reporters have no First Amendment privilege to refuse to testify or disclose their news sources to a Federal grand jury.[1]

The result of this decision was an intensive debate concerning newsmen's shield laws,* and the issue was a prominent one before the Congress, particularly during late 1972 and early 1973. Both House and Senate judiciary subcommittees held extensive hearings, and the issue was given widespread coverage in the news media.

The majority of the Court in *Branzburg* invited Congress to act in this area, with the result that more than thirty bills granting some sort of newsmen's privilege were introduced during the 1973 session.

During that year legislation was enacted by six states, bringing the number of states with some type of shield law to twenty-five.**

An Underlying Tradition

PROTECTION OF THE CONFIDENTIALITY OF NEWS SOURCES has been an underlying press tradition. For example, Canon 5 of the Code of Ethics of the American Newspaper Guild, adopted in 1934, provided: " . . . newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies."[2]

However, newsmen's privilege was not a right recognized at common law, and the courts have been reluctant to grant recognition of additional privileges. They generally regard this matter as one for the Legislature.[3]

When a claim of newsmen's privilege was first made in California in 1897, the state Supreme Court sharply repudiated the idea. The prosecution, in this

*"Shield law" and "privilege" are used here interchangeably, although some commentators have objected to the term "privilege" as a misleading label in that the protection is not to confer a special benefit to newsmen but rather to insure the flow of information to the public.

**Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee.

celebrated Blanche Lamont murder case, asked the defendant if certain information had not been given to a newspaper reporter. The defendant's counsel objected on the grounds the statement was privileged. The Court summarily rejected this argument, remarking: " . . . the claim scarcely merits comment."[4]

At issue are two competing rights involving fundamental constitutional questions: on the one hand, the public's right to a free, uninhibited and aggressive press guaranteed by the First Amendment; and, on the other, the right of the government to identify and develop evidence bearing upon alleged violation of criminal laws, with a concurrent obligation of citizens to testify under compulsory process.

The issue of newsmen's privilege usually arises in four kinds of situations, as follows:

1. *Where a newsman has written and his paper has published a story exposing illegal activity, and the District Attorney or Attorney General calls him before a grand jury to divulge names or information so that the government can prosecute the criminal violators or at least investigate the activity.*

2. *Where the statements used by a newsman are relevant to a civil case and he is subpoenaed to testify at the request of one of the litigants.*

3. *Where either the prosecutor or the defendant seeks the newsman's testimony in a criminal trial of a third person--other than the informant.*

4. *Where the subject matter relates to government activity and the newsman is questioned by a legislative committee.*[5]

Upsurge of Subpoenas

FOR MANY YEARS THE PRESS AND PROSECUTING OFFICIALS, both Federal and state, co-existed in an uncertain situation. Only an occasional case focused on the issue, and the courts, in cases that did arise in the late 1950's and early 1960's, consistently rejected First Amendment arguments as a basis on which to grant the privilege. The close of the 1960's saw an upsurge of activity in the subpoenaing of newsmen, beginning after the riotous Democratic National convention in Chicago. 1970 was to become known as the "Year of the Subpoena."*

In the two-year period 1969-1970, a total of 166 subpoenas was reported as having been directed against the three television networks, requesting newsmen's

**"Subpoena" means literally "under penalty." The writ also may take the form of a "subpoena duces tecum," requiring the witness, in addition to testifying, to produce certain described books, papers, records, documents.*

notes or TV tapes.[6] In the same period, the *Chicago Daily News* and *Chicago Sun-Times* were said to have received thirty subpoenas, two-thirds of them on behalf of the government.[7] In February, 1973, the editor of the *Los Angeles Times* testified at Senate subcommittee hearings that in the previous few years the *Times* had been served with more than thirty subpoenas and threatened with fifty others. The newspaper, he said, had spent more than $200,000 in the past few years--"the vast bulk of it in the past year"--defending itself against subpoenas.[8]

In previous years there seems to have been more *de facto* recognition of the newsman's privilege. Today, there apparently is less negotiation and accommodation. Various other factors can be cited as contributing to the increased tendency to use reporters as evidentiary sources in criminal investigation:

1. *The general political and cultural fragmentation of society today, resulting in media coverage being more involved with dissident groups--groups in which law enforcement would have considerable interest.*

2. *Bigness of government and the proliferation of self-serving public pronouncements have created greater need for indepth investigative reporting. The result has been development of a greater number of special reporters in a variety of fields--newsmen often with expertise in areas of pressing concern to law enforcement.*

3. *Protest groups, sometimes engaging in violence, present difficult problems for investigatory agencies. It was much easier in the past for the Department of Justice to penetrate organized crime or official corruption than, say, to probe today's Weathermen or Students for a Democratic Society.*

4. *The increase in crime puts new pressures on investigative agencies, resulting often in frustration by officials at the magnitude of their duties and their inability to cope with militant, radical groups. There is a natural tendency to seek any sort of available evidence, and informed newsmen are a highly tempting avenue.*

THE CALDWELL (BRANZBURG) CASE

DESPITE OCCASIONAL CONFLICTS regarding newsmen's privilege, it was 1972 before the first case reached the U.S. Supreme Court.* In a controversial, 87-page opinion Justice Byron R. White, writing for the majority, emphasized that on the record before the Court:

*Branzburg v. Hayes, 408 U.S. 665 (1972). Three newsmen (Branzburg, Pappas and Caldwell) each had been subpoenaed to appear before grand juries to answer questions based on information they had obtained in the course of writing news stories.

. . . we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. [408 U.S. 690, 691].

USE OF CONFIDENTIAL SOURCES

DOCUMENTATION SHOWING THAT NEWSMEN relied extensively on confidential sources was presented to the Court, which remained skeptical. It described the surveys submitted as "chiefly opinions of predicted informant behavior" to be viewed "in the light of the professional self-interest of the interviewees." [408 U.S. at 694].

The principal empirical study was undertaken by Professor Vince Blasi of the University of Michigan Law School who, after questioning a nationwide sample of 975 newsmen, reported that the average reporter relied on "regular" confidential sources in 22.2 percent of his stories and on first-time confidential sources in 12.2 percent of his stories. Depending on the overlap, the average respondent relied on one or the other kind of confidential source in anywhere from 22.2 percent to 34.4 percent of his stories.[9]

Those undertaking governmental, investigative, financial and radical group assignments reported the greatest reliance on confidential sources.[10]

In a 1967 survey a panel of newspaper editors was asked: "On the average how many stories based on information received in confidence are published in your paper each year?" The *Wall Street Journal* reported "15 percent"; the *Christian Science Monitor* said "innumerable"; the *Los Angeles Herald-Examiner* reported "too many to remember"; and the *San Francisco Chronicle* replied "an absolutely staggering number. . . ."[11]

The majority of the Court in *Branzburg* characterized as "speculative" the argument that press subpoenas were harmful to the free flow of information and centered its opinion on the historic role of the grand jury and the importance of its power to compel testimony.

A brief, concurring opinion by Justice Lewis F. Powell, Jr. seems significant. He emphasized the "limited nature" of the Court's holding, indicating that the Court in the future would not permit harassment of newsmen by the government if the latter had not acted in good faith or if the information sought had only a "remote and tenuous relationship to the subject of the investigation . . . . " [408 U.S. at 709, 710].

Justice Powell's concurring opinion seems broader and more liberal than that of the majority and conceivably he could, in some future case, side with the four-judge minority to provide a decision more protective of newsmen than that provided by the *Branzburg* decision. Justice Potter Stewart, in his dissent,

described Justice Powell's opinion as "enigmatic" and as suggesting "some hope of a more flexible view in the future . . . . " [408 U.S. at 725].

The dissent criticized the Court for showing a "disturbing insensitivity to the critical role of an independent press in our society." [*Ibid.*].

On several occasions the majority opinion stated that newsmen had no more rights than "other citizens" or the "public generally." [408 U.S. at 684, 702].

In the initial *Caldwell* hearing, Judge Alfonso J. Zirpoli in the Federal District Court for the Northern District of California, denied Caldwell's motion to quash a subpoena but provided a breakthrough in ruling that the newsman had limited First Amendment rights. Judge Zirpoli, while holding that Caldwell must appear before the grand jury, issued a protective order exempting him from disclosing information obtained in confidence unless there was a "showing by the government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means. . . . "[12]

The U.S. 9th Circuit Court of Appeals agreed with Judge Zirpoli that Caldwell was entitled to a qualified privilege but went further by exempting him from appearing at all before the grand jury, a decision based on Caldwell's claim that such appearance would jeopardize his relationships with his news sources and impair the flow of news to the public.[13]

Three positions thus are identifiable in the *Branzburg* opinions:

1. *A reporter has an "absolute" privilege (Justice Douglas' separate dissent);*

2. *A reporter has a "qualified" privilege (Justice Stewart's dissent, joined by Justices Brennan and Marshall);*

3. *A reporter has a very "limited" right (Justice White, for the majority).*

ATTORNEY GENERAL'S GUIDELINES

IN AN APPARENTLY CONCILIATORY RESPONSE to the reaction to the *Branzburg* decision, the Department of Justice in August, 1970, issued guidelines regarding the issuance of subpoenas to newsmen.

The guidelines, conceding that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights," required that all subpoenas of newsmen had to be authorized personally by the Attorney General. The guidelines also required that a subpoena be issued only when the information could not be obtained by any other means and was essential to the successful investigation of a specific, serious crime.

In October, 1973, the Department of Justice issued new guidelines, generally identical to those of August, 1970, but providing new protections by requiring

"express authority" of the Attorney General prior to obtaining an arrest warrant or indictment or before questioning a newsman.[14]

While representing commendable restrictions on prosecutors, the guidelines have been criticized on the ground that they may be revoked at will and without notice. They place ultimate discretion in the Attorney General rather than providing, as a qualified privilege could, for disinterested judicial review.

PRIVILEGE "PROS AND CONS"

THE ARGUMENTS IN FAVOR OF NEWSMEN'S PRIVILEGE can be summarized:

1. Reporters, faced with a choice of breaking a confidence or going to jail, may resist seeking out investigative-type stories that they otherwise would pursue. Without privilege, sources are reluctant to talk, resulting in the public being deprived of information to which it has a right and need.

2. The result of the exercise of compulsory process against newsmen is a "chilling effect" on the flow of information. Valuable freedoms are lost--with no substantial or realistic improvement in law enforcement. The newsman's "watch-dog" role is sacrificed and his service to the public and the criminal justice system is lost.

3. If reporters are perceived by the public as an extension of law enforcement, the net effect will be to hinder rather than assist law enforcement.

4. The threat of subpoenas causes news organizations to be hesitant to report events they might otherwise cover for fear a photographer's films, television "outtakes" or reporters' notes might become the subject of compulsory process. If the government can subpoena such material, the government could also set itself up as a sort of "super-editor," passing on the accuracy and objectivity of the news report.

Principal opposition to shield laws stems from the concept that a major tenet of the judicial system is that individuals must testify before a court of law if called to do so. Other arguments against shield laws are:

1. A privilege law would encourage false stories and increase libel suits. Such a statute would increase, if not encourage, "irresponsible" reporting since the newsman could not be questioned as to his sources.

2. A shield law could conceivably be a step leading to further governmental encroachment on the press. The news media should not be in a position of petitioning Congress for their rights since Congress would be placed in the role of defining <u>who</u> is protected by the statute--or <u>who</u> is a newsman. The next step <u>could be</u> a licensing process, since the news media have asked to be placed in the same category as the licensed, screened professions receiving such privilege--e.g., attorneys, doctors and priests.

3. Privilege-law opponents conclude that a statute really is not necessary in that it would not actually increase the flow of information. The press has flourished for centuries without privilege laws; why do we need them now?

ABSOLUTE OR QUALIFIED PRIVILEGE?

CONSIDERATION OF A SHIELD LAW involves the basic decision as to whether such protection should be absolute or qualified.

Advocates of an *absolute* privilege argue that for any shield law to be effective it must grant an absolute right to newsmen to decline to reveal the source or content of information gathered in the course of their work. They stress that, overwhelmingly, the confidential sources relied on by newsmen are not the leaders of radical groups or organized crime but rather are dedicated and conscientious public servants who "leak" to reporters because they disagree with their superiors' policies or resent dishonesty or corruption.

Justice William Douglas' dissent in *Branzburg* is cited: "Sooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all." [408 U.S. at 720].

In response to arguments that an absolute shield law will impede the functioning of the criminal justice system, advocates maintain such "costs" to society are so highly exaggerated and minimal that they do not represent any significant loss to the criminal system.

Actually, in Congressional hearings it became clear that some of those who testified in support of an *absolute* privilege did not really mean *absolute*--but would have qualified the immunity to apply to a reporter only when he was in the process of acting in his capacity as a newsman, not as a citizen who happened to witness a crime.

The problem of the reporter who was an eyewitness to a crime was a stumbling block for many Congressmen who appeared otherwise sympathetic to shield laws and an absolute immunity. Supporters of an absolute privilege gave assurances that the individual newsman "has the same duty as any other person when he is out walking down the street and sees a bank robbery."[15]

This raises the question as to whether only *confidential* communications between reporters and their sources should be protected, or whether the privilege would extend to material gathered in the process of obtaining news but *not* as a result of a pledge of confidence--for example, a reporter covering a public demonstration that generates law breaking. Should his eyewitness observations of such a public event be subject to compulsory process?[16]

WHO SHOULD BE PROTECTED?

UNDER EITHER CIRCUMSTANCE--qualified or absolute--two primary policy questions are involved:

(1) *Who is to receive the protection?*

(2) *What is to be protected?*

Some proposed legislation would limit the privilege to "professional newsmen" or "full-time reporters" or to those employed "regularly or periodically." Some bills would apply only to those employed on publications of "general interest" or those that carried "general news," eliminating house organs and many special-interest periodicals. What about the "alternative" or "underground" press? The student press? Freelancers who might be working on investigative stories of considerable public importance would not be covered by many such definitions.

The protection needs to be broad enough to protect the flow of news but not to shield a person who decides to be an occasional or incidental writer and thus evade his duty as a citizen. The horrendous hypotheticals depict an organized crime newspaper in which all members of the mob are columnists and thus protected from testifying before an investigative body.

Anthony Amsterdam, Stanford law professor who served as Caldwell's attorney, proposed an approach focused on three characteristics or attributes:

1. *the person have a function in gathering, processing or disseminating news;*

2. *the dissemination be to the general public; and*

3. *the dissemination be on a regular or periodic basis.*[17]

Other proposals cover freelance journalists providing "their professional status is established by a showing of prior publication or broadcast of their materials in one of the covered media."[18]

Two national correspondents, Fred Graham of CBS and Jack Landau of Newhouse News Service, both members of the Reporters' Committee for Freedom of the Press, have suggested that the greatest number of journalists be covered without attempts to include all purveyors of information and opinion. They suggested the statute grant the privilege to "recognized members of the press" and permit the courts to decide who should and should not qualify.[19]

WHAT SHOULD BE PROTECTED?

THE DECISION ON *WHAT* IS TO BE PROTECTED involves such questions as whether *information*, as well as the source, is covered; whether the information has to have been published or only procured for publication; whether the protection should be limited to information received in confidence; and--importantly--what qualifications or exceptions should be permitted.

Nearly all the state statutes--including California's--extend protection only to *sources* of information, leaving open the question of the protection for information the newsman may have personally observed and also the nature of information he received from a source.

In such statutes, state courts have given varied construction to the word "source." In Pennsylvania, it was held the term included not only the identity of a person but also documents, inanimate objects and all sources of information.[20]

On the other hand, in the Peter Bridge case, New Jersey courts upheld the contempt citation of a reporter who refused to testify before a grand jury regarding information, both published and unpublished, given him by an *identified* informant.[21]

A Kentucky statute, which protects the newsman from disclosing sources of information, was held by the state court of appeals not to exempt a reporter from refusing to testify about events he had observed personally, including the identities of persons he had observed, even if they were also his informants.[22] Branzburg had written stories about drug use and had witnessed the production and use of illegal drugs--criminal conduct that was the focus of a grand jury investigation.

TWO-LEVEL APPROACH

ONE APPROACH TO PROTECTING INFORMATION obtained by the newsman *not* in confidence has been by analogy to the concept of the "work product" of the attorney. The problem is the protection of television "outtakes," a newsman's observations at a civil disturbance, tapes of radio interviews and the like.

Some suggest a bifurcated privilege: an absolute, or nearly absolute, privilege for confidential sources and confidential information; and a qualified privilege for the newsman's "work product," which could be overcome by considerations justifying disclosure in the analogous situation of the attorney's work product. In the newsman's situation, a subpoena would issue only after a demonstration of an "overriding and compelling need."

A two-tiered privilege also has been suggested to distinguish criminal and civil actions, providing a stronger immunity in an investigative proceeding than in an adjudicative proceeding. The privilege in the latter could be more readily overcome by a showing of the importance of the newsman's information to the deter-

mination of a disputed issue.

The various qualified shield laws that have been proposed vary in the standard or test that would permit the privilege to be overcome. To cite some of the circumstances included in various bills presented in the 93rd Congress:

--*"a compelling and overriding national interest."*

--*"cases of foreign aggression and espionage."*

--*"information involving a threat to a specific human life."*

--*"information clearly relevant to a specific probable violation of a law."*

--*"testimony directly relevant to a central issue in a criminal allegation."*

--*"information that would 'adversely affect the public safety to a substantial degree.'"*

--*"information tending to prove or disprove the commission of a crime."*

STATE STANDARDS

STANDARDS EMPLOYED IN SOME OF THE STATE STATUTES are quite general. The Arkansas statute, for example, permits a court to order a newsman to testify if there is a showing the publication was in "bad faith, with malice and not in the interest of the public welfare."[23] In Louisiana, disclosure can be ordered if there is a finding that it is "essential to the public interest."[24] In New Mexico an "essential to prevent injustice" test is used.[25]

One of the most recent statutes adopted was in Delaware; it was identical to a "Uniform Reporters' Privilege Act" drafted by the National Conference of Commissioners on Uniform State Laws.[26] The statute gives reporters an absolute privilege not to reveal sources or the content of information in *non-adjudicative* proceedings, which were defined to include grand juries. In *adjudicative* proceedings--judicial or quasi-judicial proceedings in which the rights of parties are determined--a reporter can be required by a judge to testify concerning the content of information "if it is determined that revelation is in the public interest and will not substantially increase the likelihood that the source of the information will be discovered."

Source is defined as *not* including a person from whom the reporter obtains information by means of observation unaccompanied by a confidential communication directed by the person to the reporter.

THE FEDERAL SCENE

BETWEEN CONGRESSIONAL HEARINGS in the fall of 1972 and those in the spring of 1973, two differences among news media spokesmen were apparent.

One was a shift to an almost unanimous demand for an absolute shield law by several organizations that previously had endorsed a qualified bill. The shift apparently was caused by the intervening imprisonment of several newsmen and the rash of subpoenas that had been served. This shift was further characterized by a substantial number of witnesses expressing the belief that no legislation would be better than a qualified privilege, regardless how narrowly it was drawn.

The second change was a strong trend among media for legislation that would apply to state proceedings as well as Federal. The question involves constitutional interpretation and experts have disagreed. Advocates of pre-emption of state proceedings by a Federal statute generally support such an approach through the Commerce clause. Proponents of bills covering both Federal and state proceedings point to the fact that most of the cases in which newsmen have been held in contempt arose in state courts, and that such legislation was particularly needed in the twenty-five states that do not have any type of shield law.

Also, it was argued that the tendency of state court judges to evade the clear intent of many existing state shield laws made a pre-emptive bill "absolutely critical."[27]

Spokesmen for the Reporters' Committee for Freedom of the Press testified in Senate committee hearings: "We feel most strongly about the pre-emptive approach. We think it would be a Pyrrhic victory for the Congress to pass a shield law which covered only one of the 51 jurisdictions where newsmen may be subpoenaed."[28]

Congressional hearings have resulted in only one compromise bill being reported out of committee--H.R. 5928. Media reaction has been mixed. The ANPA announced it supported the legislation "in principle."[29] The bill provides an absolute privilege to withhold information before legislative, executive and judicial proceedings--including grand juries--and a qualified privilege to withhold confidential information during civil and criminal trials.

H.R. 5928 would extend testimonial privilege to state proceedings as well as those at the Federal level. It would prohibit a newsman's claim of privilege in defamation cases in which the newsman was named as a defendant.*

**Recognition of a journalist's privilege in libel suits, combined with the stringent requirements of New York Times v. Sullivan, it is argued, would make recovery virtually impossible. However, in Cervantes v. Time the U.S. 8th Circuit Court of Appeals held that a public official could not use a libel suit as a routine means of discovering a reporter's confidential sources without a positive showing of "cognizable prejudice" to the libel plaintiff; there must be "concrete demonstration that the identity of news sources will lead to persuasive evidence of the issue of malice. . . . " [464 F.2d 986, 994 (1973)].*

Informed judgment was that the political realities made enactment of an absolute privilege bill unattainable. The increasing number of media representatives who shifted to favor an absolute bill or none at all, combined with more pressing problems facing the Congress, makes it highly unlikely that any version of a shield law will emerge form the 93rd Congress.*

CALIFORNIA'S SHIELD LAW

CALIFORNIA INITIALLY ENACTED a newsmen's privilege statute in 1935 as part of the Code of Civil Procedure--subsection 6 of section 1881. In 1965 this provision was repealed and re-enacted without change as Evidence Code section 1070.

The initial statute had been amended in 1961 to include radio and television. In 1971 it was broadened: (a) to provide protection to newsmen so employed at the time the news was procured, not just at the time the immunity was invoked; and (b) to protect not just published, but *unpublished* material as well. In 1972 it was further broadened to make clear that it applied to grand jury proceedings, i.e., to "any body having the power to issue subpoenas."

The Code section in its present form reads:

> *A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper.*
>
> *Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television.*

In applying the two questions previously asked (*who* is to receive the protection and *what* is to be protected) the California statute has these significant characteristics:

1. It applies only to limited categories of newsmen. It would not cover

In February, 1974, the House of Delegates of the American Bar Association rejected a recommendation of a special study committee for a narrowly qualified law, leading to further speculation that Congress would not act favorably on any of the numerous bills now pending. (New York Times, Feb. 4, 1974, p. 26).

the freelancer, and the courts have held that it did not protect magazine writers.*

2. As the statute presently reads, it protects from disclosure only "sources of any information"--not information itself--a provision that seems ambiguous and subject to different interpretations. (*Supra*, p. 98).

The California statute had generally been listed in the "absolute" category,** but a California appellate court in the 1971 *Farr v. Superior Court* case questioned the constitutionality of the statute as applied in the circumstances of that case. [22 C.A.3d 60 (1971)].

At the beginning of 1973, several bills were introduced in the California Legislature aimed at strengthening the statutory protection. Extensive hearings by the Assembly Judiciary Committee failed to produce a consensus, and early in 1974 it was announced that all proposed shield legislation would remain under study by the committee--ending any possibility of legislative action during the 1974 term.+

THE FARR CASE

THE *FARR* CASE GREW OUT OF THE TRIAL in Los Angeles of Charles Manson and his codefendants for two sets of multiple murders. Early in the proceedings the trial judge entered an "Order re Publicity," prohibiting any attorney, court employee, attache or witness from releasing for public dissemination the content or nature of any testimony that might be given at the trial or any evidence the admissibility of which might have to be determined by the court.

William Farr, then a reporter for the *Los Angeles Herald-Examiner* (now with the *Los Angeles Times*), obtained and published an account of a prospective witness that the Manson "family" planned to torture and murder several show business personalities.

**Section 1070 "provides an immunity (to a newsman) from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of other sanctions for refusal of a newsman to make discovery when he is a party to a civil proceeding." (West's Annotated Code, Evidence Code sec. 1070, note, p. 655). In Application of Cepeda, a Federal court, applying California law, held that a Look magazine sports writer was not protected. [233 F. Supp 465 (1964)].*

***E.g., it was so categorized in a compilation of shield laws made by the Reference Service of the Library of Congress, Nov. 14, 1972.*

+The California Publisher, Feb., 1974, p. 29. All pending legislation died in committee without discussion on January 22.

The trial judge sought to learn from Farr where he had obtained the information, although conceding that under the California statute he could not compel disclosure.

After the trial Judge Charles H. Older pursued the matter again, and in contempt proceedings Farr revealed that he had obtained the information from two attorneys in the case and another person subject to the judge's "gag order."

By that time Farr had left the *Herald-Examiner* and was employed as press secretary to the District Attorney, the prosecutor in the Manson trial. Farr declined to identify his sources and was held in contempt. At the hearing each of the six attorneys, testifying under oath, denied he had directly or indirectly furnished the statement to Farr. The court, after further refusal by Farr to reveal his sources, found him in direct contempt and ordered him held in the county jail until he answered the judge's questions. The sentence was stayed pending appeal.

In proceedings before the California Courts of Appeal, Farr contended he had immunity under Evidence Code section 1070 since he had been a newspaperman when he solicited and received the statement--although he was no longer a newsman at the time of the hearing. Briefs submitted on Farr's behalf argued that the "Order re Publicity" issued in the Manson trial was void as an unconstitutional restriction on freedom of the press.

The Court of Appeal upheld the validity both of the protective order and the contempt order, ruling that the newsmen's privilege statute and the First Amendment did not apply in Farr's situation. The appeal court concluded that to construe the state statute as granting immunity to Farr "in the face of the facts here present would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." [22 C.A.3d at 69].

The court held that in the "peculiar facts" of Farr's case the contempt order was "necessary to discharge the duty of the trial court to perfect a record pertaining to an issue likely to arise on appeal and an equally important duty to protect the integrity of the very process of prosecution and defense of the principal case, the Manson trial." [22 C.A.3d at 68]. The court concluded that the "mandate" of the U.S. Supreme Court in *Sheppard* could be discharged only if the trial court could compel disclosure of the origins of prejudicial publicity. It failed to reach the narrow issue of construction of the code as to its protection for former members of the news media, and the Legislature soon afterwards amended the statute to provide such coverage.

Both the California Supreme Court and the U.S. Supreme Court declined to interfere with the appellate ruling. The trial judge gave Farr another chance to reveal his sources but he refused and was sent to jail. Petitions for writ of habeas corpus were brought in both state and Federal courts, but failed. After Farr had spent forty-six days in the Los Angeles County jail, Justice Douglas ordered him released "in the interest of justice" while the pending appeal was being considered.

Farr's appeal to the Federal court was argued in January, 1974, before a three-judge panel which took the case under consideration. Only two days earlier, the state Court of Appeal for the Second District denied his petition for habeas corpus. However, it stayed execution of judgment to permit further proceedings in the trial court that could provide a solution to Farr's case.

The state court ruled that Farr's indefinite jail sentence for contempt was not cruel or unusual punishment, but left him a chance to show that it might be considered such. The court explained that an order of commitment incarcerating a person until he complied with a valid order of the court was not to punish but to enforce an order of the court, concluding Farr's commitment was "neither punishment, cruel, nor unusual."

However, the court pointed out that where disobedience of such an order was based on an "established articulated moral principle" a special problem is presented.

The court held:

> *In such a situation, it is necessary to determine the point at which the commitment ceases to serve its coercive purpose and becomes punitive in character. When that point is reached so that the incarceration of the contemner becomes penal, its duration is limited by the five-day maximum sentence provided in the Code of Civil Procedure section 1218. . . . [T]he test of the distinction lies in the presence or absence of a substantial likelihood that continued commitment will accomplish the purpose of the order upon which the commitment is based.* [*In re Farr*, 36 C.A.3d 577, 584 (1974)].

Bill Farr has continued to maintain that he will stay in jail "indefinitely" rather than reveal his sources. Meanwhile the suggested proceedings have been instituted by Farr's attorney in superior court, and a special hearing requested.

CONCLUSIONS

THE ADVERSARY ROLES OF THE PRESS AND GOVERNMENT have a long history and tradition, characterized by the oft-quoted *London Times* editorial of February 7, 1852: "The press lives by disclosures. . . . The statesman's duty is precisely the reverse. . . . "

The traditional state of "inevitable tension" between press and government seems in recent years to have become increasingly prevalent, at times more bitter, often with political undertones. Events of the past few years have demonstrated that the conflict between the subpoena and the press is very real.

Despite skepticism expressed by the Supreme Court in *Branzburg*, there is considerable evidence that newsmen rely extensively on confidential sources, and it is reasonable to assume these sources would be deterred from giving information to newsmen if they feared their identities would be disclosed.

The result is to discourage or impede confidential relationships between reporters and informants, diminishing the flow of information to the public and jeopardizing the independence of the news media.

Most persons who have studied the issue have concluded that some type of shield law for the press could be justified. It is not surprising there has been a lack of consensus as to the form legislation should take, considering the several policy determinations to be made and their variations and combinations:

1--source/content?

2--Federal/state?

3--professional journalists/others?

4--absolute/qualified?

5--published/unpublished information?

6--confidential/nonconfidential sources?

Recently a number of press spokesmen have taken an all or nothing position. This may be, in part, legislative strategy based on the idea that there would be little negotiating room for shield law proponents if they came into committee hearings with their minimum proposal.

However since an absolute privilege appears unattainable, the better approach would seem to be a *very narrowly drawn* qualified statute as preferable to no legislation at all.

If the Supreme Court, in the *Branzburg* case, had accepted the doctrine of the U.S. 9th Circuit Court of Appeals in *Caldwell*--granting a qualified privilege--the news media would have been highly satisfied. A statute, of course, could provide the same protection--or more.

The statute must be unambiguous, carefully defining the privilege. Exceptions must be stated with particularity. Language must be specific as to the occasion under which the pledge of confidentiality could be overcome. A *broad* exception, e.g., "in the public interest," would not permit a source to be certain of the protection he could expect, or a newsman to be able to predict the circumstances under which he could be required to reveal his sources. Any qualified statute must possess a high degree of *predictability*.

Unless the qualified statute were thus drawn, the better approach would be reliance on the common law and the courts to protect First Amendment rights on a case-by-case narrowing of the authority of *Branzburg*. There are in that opinion, one should recall, Justice Powell's reference to the "limited nature" of the Court's decision and Justice Stewart's "hope of a more flexible view in the future."

In the long run, it has been argued, the judiciary has been a more vigilant

protector of First Amendment rights than either the executive or the legislative branches.[30] Alexander M. Bickel, Yale University law professor, in his 1972 Morrison Lecture at the State Bar convention, warned that "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."[31]

Judge Zirpoli, who presided over the *Caldwell* case at the trial level, has predicted that the courts on a case-by-case basis eventually will mold a "fairly solid constitutional shield for the press and certainly a constitutional shield is to be preferred to a statutory shield."[32]

Barring an absolute privilege, which clearly appears unattainable, there seems to be merit to this position.

FOOTNOTES

[1]*Branzburg v. Hayes*, 408 U.S. 665 (1972).

[2]*Editor and Publisher*, June 16, 1934, pp. 7-41.

[3]*Garland v. Torre*, 259 F.2d 545 (1958).

[4]*People v. Durrant*, 116 C. 179, 220 (1897).

[5]Guest and Stanzler, "The Constitutional Argument for Newsmen Concealing Their Sources," 64 *Northwestern University L. R.* 18, 20 (1969-1970).

[6]Statement of Citizen's Right to News Committee in Hearing before Subcommittee No. 3 of the House Judiciary Committee, 93rd Cong., 1st Sess. 558 (1973).

[7]*Ibid.*, 485.

[8]William F. Thomas, in Hearing before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 93rd Cong., 1st Sess. 282 (1973).

[9]Blasi, "The Newsman's Privilege: An Empirical Study," 70 *Michigan L. R.* 229, 247 (1970).

[10]*Ibid.*, 251, 252.

[11]Guest and Stanzler, *op. cit.*, 58-60.

[12]*Application of Caldwell*, 311 F. Supp. 358, 362 (1970).

[13]*Caldwell v. U.S.*, 434 F.2d 1081 (1970).

[14]42 *Law Week* 2232 (Oct. 30, 1973).

[15]Fred Graham, Senate Hearings, *op. cit.*, 70.

[16]*Ibid.*, 17, 18.

[17]Anthony Amsterdam, Senate Hearings, *op. cit.*, 196, 197.

[18]Association of the Bar of the City of New York, Committee on Federal Legislation, "Tinkering with the First," *Trial*, May-June, 1973, p. 38.

[19]"The Shield Law We Need," 11 *Columbia Journalism Review* 28 (Apr.-May, 1973).

[20]*In re Taylor*, 412 Pa. 32 (1963).

[21]*In re Bridge*, 295 A.2d 3 (1972).

[22]*Branzburg v. Pound*, 461 S.W.2d 345 (1970).

[23]Ark. Stat. Anno., Title 43, sec. 917 (1937).

[24]La. Stat. Anno., Art. 45, sec. 1453 (1964).

[25]N.M. Stat. Anno., sec. 20-1-12.1 (1973).

[26]Laws of Delaware, Vol. 59, Ch. 163 (1973).

[27]Graham and Landau, Senate Hearings, *op. cit.*, 79.

[28]*Ibid.*

[29]*ANPA General Bulletin*, Jan. 25, 1974, p. 17.

[30]Joseph Califano, Jr., "Shielding the Press," *New Republic*, May 5, 1973.

[31]Alexander M. Bickel, "The 'Uninhibited, Robust and Wideopen' First Amendment," *Commentary*, Nov., 1972, pp. 60, 61.

[32]Transcript of proceedings for "The Law, the Courts and the News Media," *Los Angeles Daily Journal*, Feb. 13, 1974, p. 27.

Joint Declaration Regarding News Coverage of Criminal Proceedings in California

STATEMENT OF PRINCIPLES

The bench, bar, and news media of California recognize that freedom of the press and the right to fair trial, as guaranteed by the First and Sixth Amendments to the Constitution of the United States, sometimes appear to be in conflict. They believe, however, that if the principles of fair trial and free press are applied responsibly in accord with high professional ethics, our society can have fair trials without limiting freedom of the press.

Accordingly, the following principles are recommended to all members of the bar and the press in California.

1. The news media have the right and responsibility to gather and disseminate the news, so that the public will be informed. Free and responsible news media enhance the administration of justice. Members of the bench, the bar, and the news media should cooperate, consistent with their respective ethical principles, in accomplishing the foregoing.

2. All parties to litigation, including the state, have the right to have their causes tried fairly by impartial tribunals. Defendants in criminal cases are guaranteed this right by the Constitutions of the United States and the State of California.

3. Lawyers and journalists share with the court responsibility for maintaining an atmosphere conducive to fair trial.

4. The news media and the bar recognize the responsibility of the judge to preserve order in court and to conduct proceedings in such a manner as will serve the ends of justice.

5. Editors in deciding what news to publish should remember that:

(a) *An accused person is presumed innocent until proved guilty.*

(b) *Readers, listeners, and viewers are potential jurors or witnesses.*

(c) *No person's reputation should be injured needlessly.*

6. No lawyer should use publicity to promote his version of a pending case. The public prosecutor should not take unfair advantage of his position as an important source of news. These cautions shall not be construed to limit a lawyer's making available information to which the public is entitled. Editors should be cautious about publishing information received from lawyers who seek to try their cases in the press.

7. The public is entitled to know how justice is being administered, and it is the responsibility of the press to give the public the necessary information. A properly conducted trial maintains the confidence of the community as to the honesty of its institutions, the competence of its public officers, the impartiality of its judges, and the capacity of its criminal law to do justice.

8. Journalistic and legal training should include instruction in the meaning of constitutional rights to a fair trial, freedom of the press, and the role of both journalist and lawyer in guarding these rights.

9 A committee of representatives of the bar, the bench, and the news media, aided when appropriate by representatives of law enforcement agencies and other interested parties, should meet from time to time to review problems and to promote understanding of the principles of fair trial and free press. Its purpose may include giving advisory opinions concerning the interpretations and application of these principles.

These principles have been endorsed, as of February 15, 1970, by the following: The State Bar of California, California Freedom of Information Committee, California Newspaper Publishers Association, California Broadcasters Association, Radio and TV News Directors, and the Executive Board of the Conference of California Judges.

STATEMENT OF POLICY

To give concrete expression to these principles in newsmen's language the following statement of policy is recommended for voluntary adoption by California newspapers and news broadcasters.

Our objective is to report the news and at the same time, cooperate with the courts to assure the accused a fair trial.

Protection of the rights of an accused person or a suspect does not require restraint in publication or broadcast of the following information:

—His or her name, address, age, residence, employment, marital status, and similar background information.

—The substance or text of the charge, such as complaint, indictment, information and, where appropriate, the identity of the complainant.

—The identity of the investigating and arresting agency, and the length of investigation where appropriate.

—The circumstances surrounding an arrest, including the time and place, resistance, pursuit, possession and use of weapons, and a description of items seized.

Accuracy, good conscience, and an informed approach can provide non-prejudicial reporting of crime news. We commend to our fellow newsmen the following:

Avoid deliberate editorialization, even when a crime seems solved beyond reasonable doubt. Save the characterizations of the accused until the trial ends and guilt or innocence is determined.

Avoid editorialization by observing these rules:

—Don't call a person brought in for questioning a suspect.

—Don't call a slaying a murder until there's a formal charge.

—Don't say solution when it's just a police accusation or theory.

—Don't let prosecutors, police or defense attorneys use us as a sounding board for public opinion or personal publicity.

Exercise care in regard to publication or broadcast of purported confessions. An accused person may repudiate and thereby invalidate a confession, claiming undue pressure, lack of counsel, or some other interference with his rights. The confession then may not be presented as evidence and yet have been read by the jurors, raising the question whether they can separate the confession from evidence presented in court. If you do use a "confession" call it a statement and let the jury decide whether the accused really confessed.

In some circumstances, as when a previous offense is not linked in a pattern with the case in question, the press should not publish or broadcast the previous criminal record of a person accused of a felony. Terms like "a long record" should generally be avoided. There are, however, other circumstances—as when parole is violated—in which reference to a previous conviction is in the public interest.

Records of convictions and prior criminal charges which are matters of public record are available to the news media through police agencies or court clerks. Law enforcement agencies should make such information available to the news media upon appropriate inquiry. The public disclosure of this information by the news media could be prejudicial without any significant contribution toward meeting the public need to be informed. The publication or broadcast of such information should be carefully considered.

In summary:

This Statement of Policy is not all-inclusive; it does not purport to cover every subject on which a question may arise with respect to whether particular information should be published or broadcast. Our objective is to report the news and at the same time cooperate with the courts to help assure the accused a fair trial. Caution should therefore be exercised in publishing or broadcasting information which might result in denial of a fair trial.

Judicial Council Action

[The Judicial Council at its May 1970 meeting approved the following recommendations:

[(1) That when appropriate the Chairman of the Judicial Council designate representatives to participate in joint committees, such as those contemplated by paragraph 9 of the Statement of Principles, "to review problems and to promote understanding of the principles of fair trial and free press."

[(2) In order to give recognition to the Joint Declaration, and to bring it to the attention of the judiciary, the Judicial Council added to the "Standards for Judicial Administration, Section 3, Duties of Presiding Judge," the following new subsection, effective July 1, 1970:

[Sec. 2. *Duties of presiding judge*

[In superior and municipal courts the presiding judge should: . . .

[(p) when appropriate, meet with or designate a judge or judges to meet with any committee of the bench, bar and news media to review problems and to promote understanding of the principles of fair trial and free press, under paragraph 9 of the "Joint Declaration Regarding News Coverage of Criminal Proceedings in California," as approved for submission on January 16, 1970, and adopted by the State Bar of California and the California Freedom of Information Committee.]

The Society of Professional Journalists, Sigma Delta Chi

Code of Ethics

(Adopted by the national convention, Nov. 16, 1973)

THE SOCIETY of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve the truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report the facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy, and fairness.

To these ends, we declare acceptance of the standards of practice here set forth:

• **RESPONSIBILITY:** The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

• **FREEDOM OF THE PRESS:** Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and the responsibility to discuss, question, and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

• **ETHICS:** Journalists must be free of obligation to any interest other than the public's right to know.

1. Gifts, favors, free travel, special treatment or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

• **ACCURACY AND OBJECTIVITY:** Good faith with the public is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience, and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

• **FAIR PLAY:** Journalists at all times will show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.

• **PLEDGE:** Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people. ■

Conference of California Judges

Canons of Judicial Ethics*

PREAMBLE

The Conference of California Judges, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their offices. The Conference accordingly adopts the following Canons, as a proper guide and reminder for justices and judges of courts of record in California, and as indicating what the people have a right to expect from them.

1—Relations of Judiciary

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court and the witnesses, jurors and attendants who aid him in the administration of its functions.

2—The Public Interest

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3—Constitutional Obligations

It is the duty of all justices and judges of the courts of California to support and defend the Constitution of the United States and the Constitution of California; in so doing, they shall fearlessly observe and apply fundamental limitations and guarantees.

[Note Based on A.B.A. Canon 3, with necessary modifications.]

4—Avoidance of Impropriety

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and in his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

5—Essential Conduct

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6—Industry and Promptness; Court Organization

A judge should be courteous, cooperative, prompt, diligent and faithful in the performance of his duties. During the hours when his court is open for the conduct of official business, a judge should refrain from solemnizing marriages and from performing other services in his capacity as a judge not related to his judicial duties.

A judge should organize his court for the efficient handling of business, and should demand courtesy, efficiency and dispatch on the part of his clerk and other assistants.

[Note: Based on A.B.A. Canons 6, 7 and 8, and on suggestions made in answer to the Conference Questionnaire.]

7—Consideration for Jurors and Others

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

8—Courtesy and Civility

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

9—Unprofessional Conduct of Attorneys

Judges should demand professional conduct on the part of attorneys in their court appearances and should take proper disciplinary measures to enforce this demand.

[Note: Based on A.B.A. Canon 11.]

10—Appointees of Judiciary

All persons appointed by judges to aid in the administration of justice should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised for personal or partisan advantage. The compensation awarded to such appointees should be fair and reasonable but never excessive.

[Note Based on A.B.A. Canon 12.]

11—Kinship or Influence

A judge should do nothing to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, position or influence of any party or other person.

[Note Based on A.B.A. Canon 13.]

12—Judicial Independence

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

13—Conduct of Trials

A judge may properly intervene during the trial of a case where this appears reasonably necessary in order to expedite proceedings, for clarification of any point, or to prevent injustice. He should remember that while, primarily, it is the function and right of attorneys to present the case of their respective clients, it is the ultimate function of the judge to see that no party appearing before him suffers an injustice which he can prevent. Litigants, witnesses and attorneys alike are entitled to have a court function as a court of justice in fact as well as in theory. In exercising the firmness necessary to the dignity and efficient conduct of court proceedings, a judge's attitude should not reflect undue impatience or severity toward either counsel, litigant, or witnesses.

[Note Based on A.B.A. Canon 15.]

14—Ex parte Applications

A judge should act upon *ex parte* applications for injunctions and other extraordinary remedies only after careful consideration and where the necessity for quick action is clearly shown. He should grant relief only when fully satisfied that the law permits the relief sought and that the urgency of the particular situation demands it.

[Note: Based on A.B.A. Canon 16.]

15—Ex parte Communications

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs or arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

16—Judicial Opinions and Decisions

Judges should receive and consider evidence and argument, and review records of trials and other proceedings with open minds. It should be remembered that a judge's duty is to ascertain and apply existing law rather than to legislate or to apply his personal concepts of what the law should be.

Final and unanimous agreement in courts of appeal, particularly in courts of last resort, is most desirable as it will lend stability to law and finality to litigation. Except in cases of conscientious and irreconcilable difference of opinion on fundamentals, dissenting opinions in appellate reports should be discouraged. When the relief granted on appeal permits or necessitates a new trial or further proceedings in the trial court, the issues raised on appeal should be discussed and determined in such manner that counsel and the trial court may be clearly guided in all further proceedings in the litigation.

[Note: Based on A.B.A. Canons 19 and 20.]

17—Idiosyncracies and Inconsistencies

Justice should not be moulded by the individual idiosyncracies of those who administer it. A judge should adopt the usual and expected method of

---

The canons were originally adopted on August 30, 1949 (See 24 State Bar J. 398 (1949)) and have been amended in several instances. They are published in the Appendix to California Rules of Court to make them readily available to all members of the judiciary. The notes appearing therein were prepared by the draftsmen of the canons. The Conference of California Judges from time to time issues opinions concerning the canons. Inquiries regarding such opinions should be directed to the office of the Conference, 307 Hall of Justice, 850 Bryant Street, San Francisco, California.

doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court.

Though vested with discretion in the imposition of mild or severe sentences a judge should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence. In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

18—Right of Review

In order that a litigant may have full benefit of the right of review, a trial judge should accord the defeated party every opportunity to present the questions that arose upon the trial exactly as they were presented and decided.

[Note: Based on A.B.A. Canon 22.]

19—Legislation

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

20—Inconsistent Obligations

A judge should not undertake duties or incur obligations which might reasonably embarrass him in the performance of his judicial duties.

[Note: Based on A.B.A. Canon 24.]

21—Business Promotions

A judge should not participate in, nor permit his name to be used in connection with, any business venture or commercial advertising program, with or without compensation, in such a way as would justify a reasonable suspicion that the power or prestige of his office is being utilized to promote a business or commercial product.

22—Personal Investments and Relations

A judge should refrain, as far as reasonably possible from all relations which might affect him in the impartial performance of his judicial duties. He should not utilize information coming to him in his judicial capacity for purposes of speculation.

[Note: Based on A.B.A. Canon 26.]

23—Executorships and Trusteeships

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

24—Partisan Politics

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by his political bias will attach to a judge who becomes the active promoter of the interests of one political party or candidate as against another. He should avoid making partisan political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office, or participation in party conventions.

A judge should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Nothing in this canon shall be deemed to prevent any judge from attending and speaking (a) on the subject of his own candidacy at any political gathering held within a reasonable time prior to an election at which he is a candidate for election or re-election (b) on any other nonpartisan subject.

[Note: Based on A.B.A. Canon 28.]

25—Self-Interest

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court in which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

26—Candidacy for Office

A candidate for judicial position should not make or suffer others to make for him promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power. He should not announce in advance his conclusions on disputed issues to secure class support, and should do nothing while a candidate to create the impression that, if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become a candidate for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it may not be said that he is using the power or prestige of his judicial position to promote his own candidacy.

[Note: Based on A.B.A. Canon 30.]

27—Private Law Practice

A justice or judge of a court of record should not practice law in or out of court.

A judge may properly act as arbitrator, or lecture upon or instruct in law, or write on legal subjects, and accept compensation therefor, if such acts do not interfere with the due performance of his judicial duties, and are not forbidden by some positive provision of law.

[Note: Based on A.B.A. Canon 31.]

28—Gifts and Favors

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

29—Social Relations

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he will continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

30—Improper Publicity of Court Proceedings

Proceedings in court should be conducted in an atmosphere of fairness and impartiality, and with dignity and decorum. The taking of photographs in the courtroom during court proceedings, or broadcasting, or recording for broadcasting, all or any part of a proceeding before a court by radio, television, or otherwise, is an improper interference with judicial proceedings and should not be permitted by a judge at any time.

[Note: Based on A.B.A. Canon 35.]

A judge should not play the role of judge in any broadcast, by radio, television, or otherwise, of any program presenting the enactment, reenactment or simulation of trials or judicial proceedings, or portions thereof.

[Added at Coronado Conference 1958.]

American Bar Association

Code of Judicial Conduct

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

(5) A judge should dispose promptly of the business of the court.

Commentary

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court

and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Commentary

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7 107 of the *Code of Professional Responsibility*.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary

Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Commentary

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1) (d) (iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding:

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:
(a) the degree of relationship is calculated according to the civil law system;

Commentary

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.
A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary

Complete separation of a judge from extra judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

*(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge engaged in a family business at the time this Code becomes effective.

Canon 5 may cause temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income through commercial activities. The remedy, however, is to secure adequate judicial salaries.

[Canon 5C(2) sets the minimum standard to which a full-time judge should adhere. Jurisdictions that do not provide adequate judicial salaries but are willing to allow full-time judges to supplement their incomes through commercial activities may adopt the following substitute until such time as adequate salaries are provided:

*(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

Jurisdictions adopting the foregoing substitute may also wish to prohibit a judge from engaging in certain types of businesses such as that of banks, public utilities, insurance companies, and other businesses affected with a public interest.]

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary

This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Commentary

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary

A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary

Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.